No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1980

FREDERICO RODRIGUEZ,

Petitioner,

-against-

COMPASS SHIPPING CO., LTD. and DJAKARTA LLOYD, P.N.,

Respondents.

LUIS PEREZ,

Petitioner,

-against-

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

-against-

OVE SKOU, R.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS COMPASS SHIPPING CO. LTD., DJAKARTA LLOYD, P.N. AND ARYA NATIONAL SHIPPING LINE, LTD.

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I.

Applicable Statutes

In addition to those statutory provisions set out in the Brief of Petitioners (pp. 2-3) the following statute is applicable:

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

II.

Statement of the Case

This appeal involves suits for negligence against shipowners by longshoremen claiming personal injuries sustained aboard ships in the port of New York. In each case plaintiff claimed workmen's compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "the Act" or "LHWCA"), Title 33 U.S.C. § 901 *et seq.* (as amended October 27, 1972), Pub. L. No. 92-576, 86 Stat. 1263 (1972). In each, plaintiff was paid so-called "voluntary" compensation "without an

award" as required by § 14(a) (33 U.S.C. § 914(a)) on account of alleged temporary total disability as provided by the Act's § 8(a) (33 U.S.C. § 908(a)). Frederico Rodriguez ultimately received $1,040.70 in such benefits from his employer, International Terminal Operating Co., Inc. for a disability period of 6⅞ weeks. Benefits were calculated at the rate of $159.06 per week, 66⅔% of his average weekly wage at the time of injury which was agreed to have been $238.59 (41a).[1]

Luis Perez ultimately received $1,200.10 in temporary total disability benefits from his employer's insurer, Midland Insurance Company. His benefits were calculated at the rate of $152.74 based on an average weekly wage of $229.12 and were paid for a 7⅞ week period.

Both Rodriguez and Perez sought additional compensation under § 8(c) for permanent partial disability. In the case of Rodriguez, this led to an informal conference before a claims examiner at the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP"). This conference, authorized by 20 C.F.R. § 702.311 (1973), took place November 4, 1974 and resulted in agreement among Rodriguez, his compensation representative and a representative of his employer to disposition of the claim for permanent partial disability, which was settled by the employer's agreement to pay the sum of $2,519.51 representing an award of 5½% permanent partial disability of the left leg.[2] The details of this agree-

1. Page references followed by the letter "a" are to be found in the Joint Appendix.

2. The sum of $2,519.51 was calculated on the basis of § 8(c)(2) as 5½% of that compensation payable in the event of loss of the leg or 280 weeks, § 908(c)(2). The money equivalent of "weeks" in computing awards for permanent injury is the same basis as for temporary total disability—66⅔% of the employee's average weekly wage.

Mr. Rodriguez also received $613.52 in additional temporary total disability benefits (41a) for that part of the alleged disability period in the aftermath of his injury which had been disputed by his employer.

ment were set out in a memorandum of informal conference (41-42a) the preface of which recited that: "[w]e the undersigned, having attended an informal conference, and having received a copy of the [within] signed agreement, in this case on 11/4/74 (sic), agree, by the issuance of a compensation order . . ." Despite reference to a compensation order none was issued, a fact of no significance to this appeal.[3]

Mr. Perez's claim for additional compensation was determined by the OWCP without hearing and resulted on March 24, 1975 in the issuance by the district deputy commissioner of a formal order granting this petitioner additional compensation of $4,360.73 representing "awards" of 5% and 7½% for loss of use of, respectively, the left foot and left hand.[4]

Mr. Rodriguez's original suit against a "third person" said to be "liable for damages" (§ 33(b)) was begun by filing of the complaint in the United States District Court,

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3. Petitioners posed four questions in the petition for writ of certiorari. The fourth question raised issue of the sufficiency of the claims examiner's participation in the settlement, and whether the memorandum was an "award of compensation in an order filed by the deputy commissioner or [Benefits Review] Board" § 33(b). Petitioners were, however, granted a writ limited to the first three questions presented which do *not* raise issue of any "technical administrative lapse" by the OWCP (see *Rodriguez* v. *Compass Shipping Co., Ltd.*, 456 F. Supp. 1014, 1020 (S.D.N.Y. 1978)) or any other defect in the compensation procedure. In *Rodriguez* both the district court and court of appeals held that the proceeding before the board constituted an "award" of sufficient formality to cause triggering of the § 33(b) assignment provision six months thereafter in view of Mr. Rodriguez's failure to sue a "third person" said to be "liable in damages" (§ 33 (a) and (b)) within six months of "acceptance" of "such compensation," § 33(b). Petitioner, Rodriguez ". . . [did] not dispute" that he had accepted the additional compensation awarded him on November 4, 1974 ". . . or that he instituted suit against the defendants more than six months after . . . his receipt of such [additional] compensation." *Rodriguez,* 456 F. Supp. at 1019.

4. Under § 8(c)(3) loss of the hand results in 244 weeks compensation for permanent partial disability. The foot results in 205 weeks, § 8(c)(4).

Southern District of New York on June 2, 1976,[5] 33 months from the occurrence of his September 4, 1973 injury. Mr. Perez began his suit on July 16, 1976, 35 months after his injury of August 30, 1973.[6]

In answer to the complaint of Rodriguez and Perez the several respondents raised as an affirmative defense, among others, the § 933(b) assignment of "all right" of petitioners to their former employers or insurance carriers asserting that petitioners were ". . . therefore without standing to maintain . . . [their] action[s]" (answer of Compass Shipping Co., Ltd. and Djakarta Lloyd P.N., paragraph 10 (26a); answer of Arya National Shipping Line, Ltd., paragraph 9. See, document 4, index to record on appeal, USDC, SDNY Index No. 76-3009.)

On April 21, 1978 respondents Compass and Djakarta Lloyd moved for summary judgment on the issue of liability for negligence and, in the alternative, to dismiss the Rodriguez complaint on grounds of the § 33(b) assignment and Rule 12(c) Fed.R.Civ.P. (judgment on the pleadings).[7] This motion was denied with respect to the application for summary judgment, which was asserted on the basis of petitioner Rodriguez's utter inability during the taking of his

5. This suit named Compass, the shipowner as a defendant. At the time of the injury in suit, the vessel aboard which Mr. Rodriguez claimed injury, S/S SOUTH BREEZE, was under bareboat charter to respondent Djakarta Lloyd, P.N. which employed the ship's crew. This action, in which Djakarta Lloyd was joined, was begun July 21, 1977.

6. Under the law of the State of New York, N.Y. CIV. PRAC. LAW § 214(5) (McKinney), suits for personal injuries must be begun within three years, which is the "rule-of-thumb" in determination of laches. *Larios* v. *Victory Carriers, Inc.*, 316 F.2d 63 (2d Cir. 1963).

7. In the affidavit of Joseph T. Stearns (April 21, 1978) in support of the motion based on the § 33(b) assignment, the relief sought was characterized as ". . . for a dismissal of this (sic) complaint on grounds that plaintiff's cause of action was assigned by operation of law prior to institution of suit . . . (32a)".

pre-trial deposition to account for the occurrence of his shipboard injury in terms other than his own carelessness.[8]

The motion to dismiss on grounds of Rule 12(c) Fed. R.Civ.P. and the § 933(b) assignment, which the district court described as brought "... on ground that ... plaintiff's claim for relief ... was assigned to his employer," (*Rodriguez,* 456 F. Supp. at 1017) and upon contention "... that under the terms of ... [§ 33(b)] ... plaintiff no longer has any claim of relief" (*Id.* at p. 1018) was also denied; not because the district court (Robert L. Carter, J.) had held that no assignment had occurred, or because the defendants/respondents were without standing to assert it, but because of the *potential* existence of a conflict of interest between this petitioner and his employer sufficient to require that the district court not give effect to the statutory assignment. This holding was, of course, obedient to this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD",* 351 U.S. 525 (1956). Because of this conflict of interest "exception" (*Rodriguez,* 456 F. Supp. at 1022) the parties were given 60 days from the court's decision of September 12, 1978 to undertake discovery on the issue, with plaintiff to bear the burden of persuasion.

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8. Mr. Rodriguez was allegedly hurt while climbing out of No. 2 hatch of M/S SOUTH BREEZE at the end of the day's work discharging bags of coffee. Hatches Nos. 2 and 3 shared a common bulkhead and the ladder to hatch No. 2 was on the other side of the ladder leading down in No. 3. Rodriguez claimed that he stepped out of the No. 2 hatch ladder manhole partly into the opening to the ladder into No. 3. Why this had happened he could not say. Thus, at p. 28 of the transcript of his deposition (Ex. "A" to the affidavit of Joseph T. Stearns sworn to April 21, 1978 in support of the motion) the following question and answer appears:

> Q. You can do nothing but repeat your description of this alleged accident, you cannot account, in any way, shape or form for why it happened that you put your left foot into the opening for hatch no. 3? A. What reason can I give you?

Mr. Rodriguez did not avail himself of discovery. Instead his attorney, on November 27, 1978, more than 60 days later, submitted a hearsay affidavit attributing to one Albert P. Cerrachio, an officer of plaintiff's employer, International Terminal Operating Co., Inc. "oral advice," ". . . that as a matter of company policy ITO did not in the past bring, maintain and/or assume the prosecution of an action against a shipowner and will not in the future bring, maintain and/or assume the prosecution of any action against a shipowner[9]" (63a).

On December 8, 1978, the district court, Mr. Rodriguez in its view having failed to discharge his burden of demonstrating a conflict of interest between himself and his employer, International Terminal Operating Co., Inc., entered a final order of dismissal ". . . pursuant to Title 33 U.S.C.A. § 933(b)" (74a) from which petitioner appealed.

In suit brought by Luis Perez, respondent moved on November 16, 1978 "for an order [of dismissal] pursuant to Rules 12 and 56 Fed.R.Civ.P. and Title 33 U.S.C.A. ¶ 933(b)." This motion, which the district court characterized as one "to dismiss the complaint on the grounds that since Perez did not commence . . . [his] . . . action within six months of the Board's (sic) award, his cause of action was assigned to his employer, and he cannot maintain this suit", *Perez* v. *Arya Shipping Line Ltd.*, 468 F. Supp. 799, 800 (SDNY 1979), was conditionally denied on April 17, 1979 by opinion and order of the district court (Morris E. Lasker, J.) in which the court, adopting the

9. This submission is classically inappropriate in light of the requirements of Rule 56(e) Fed.R.Civ.P. requiring that affidavits in opposition to a motion for summary judgment "be made on personal knowledge" setting forth facts "as would be admissible in evidence." Reciting the operative part of the attorneys' affidavit should not be considered as an abandonment by respondents, Compass and Djakarta Lloyd of their claim that petitioner Rodriguez established *nothing* of a probative nature to explain this stevedore's "failure" to sue on the § 33(b) assignment.

procedure required by Judge Carter's *Rodriguez* opinion, allowed Perez 45 days within which to submit proof of a sufficient interest conflict. No such proof was offered, although in opposition to the motion Perez's attorney, Martin Lassoff, Esq., had submitted an affidavit sworn to November 27, 1978 quoting one John Richardson, a claims attorney for Midland Insurance Company in which the attorney represented that he had been told:

> ". . . that Midland Insurance Company has not and will not make any claim, bring an action or maintain any action against the shipowner to recover damages for its negligence when a longshoreman is injured and the Company or its client stevedore could bring such action because to do so would prejudice their clients who fear that it would adversely affect their economic relationship with the steamship company." (129a)[10]

By notice of motion dated July 2, 1979, respondent Arya National Shipping Line, Ltd. moved ". . . for an order pursuant to Rule 56 Fed.R.Civ.P. for summary judgment dismissing plaintiff's complaint on grounds that pursuant to . . . 33 U.S.C. § 933(b) 'all right' of plaintiff . . . [had] . . . been assigned to his former employer's workmen's compensation insurance underwriter . . ." (Record on Appeal, SDNY Index No. 76-3009, document No. 18). On August 10, 1979, by endorsed order, Judge Lasker, after noting petitioner Perez's default in failing to undertake discovery, granted respondent Arya National Shipping Line, Ltd. summary judgment dismissing petitioner's complaint, from which he appealed.

Mr. Perez's appeal to the Second Circuit Court of Appeals was heard simultaneously with the appeal from

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10. We cite for convenience to the identical language in Mr. Lassoff's affidavit in opposition to the motion by shipowner to dismiss in *Barulec* v. *Ove Skou, R.A.* The Lassoff affidavit in *Perez* is Record on Appeal document No. 13 in SDNY Index No. 76-3009.

the dismissal in *Rodriguez* and on March 19, 1980 the judgment of dismissal of his case was "affirmed for the reasons stated in . . . [the Court of Appeals] . . . opinion in the case of *Rodriguez* v. *Compass Shipping Co., Ltd. and Djakarta Lloyd, P.N.*, Docket No. 79-7132 . . ." The "reasons stated" by the Court of Appeals in *Rodriguez* are the following:

1. A "third person" defendant has "standing" to raise the § 933(b) assignment defense which the court held may "always" be invoked pursuant to Fed.R.Civ.P. 17(a)[11] since otherwise a defendant might be exposed to multiple suits based on the same claim. *Rodriguez* v. *Compass Shipping Co. Ltd.*, 617 F.2d 955, 958 (2d Cir. 1980)

2. The Rule 17(a) Fed.R.Civ.P. defense was properly asserted, assuming the assignment to be "valid," on the particular facts of the case, because the right to sue was exclusively that of the employer which had "not joined in the action or ratified its commencement even though it has had a reasonable time to do so" (*id.*).

3. The settlement agreement "was an award in a compensation order" with the meaning of § 33(b) triggering the assignment provision and the failure of the deputy commissioner and the claims examiner to thereafter file a formal

11. The Court of Appeals, to a degree difficult to assess in scrutinizing its opinion, based its decision on Rule 17(a) Fed.R.Civ.P. "real party in interest" considerations not specifically urged as a basis for dismissal or affirmance. The *Rodriguez* defendants instead urged that they "as . . . 'third parties' under the Act have standing to assert § 933(b) as a complete defense." (Brief of Defendants-Appellees, pp. 26-30). In *Perez* respondent urged that it ". . . [had] standing to assert § 933(b) as a complete defense." (Brief on Appeal pp. 21-28). It is, therefore, accurate to say that respondents did not seek dismissal under Rule 17(a) Fed.R.Civ.P. but on a broader ground i.e. the Act's § 33(b) by urging that ". . . § 933(b) acts as a filter to ensure . . . that injured employees will not as an afterthought defeat the purpose of the 1972 Amendments by bringing actions based on unseaworthiness which are disguised as 'negligence' claims" (*Rodriguez* Brief of Defendants-Appellees pp. 36-37).

order "can have no significance as far as the parties [to the law suit] are concerned" (at 959).

4. On the facts of the case and relevant federal regulations in effect at the time of the November 4, 1974 informal conference, § 33(b) applied and operated to assign to appellant's employer his right to sue the shipowner (at pp. 959-960).

5. In light of the applicability of § 33(b) and its effect of causing an assignment, petitioner's suit was not saved by the so-called "exception" to giving effect to the § 33(b) assignment established in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD," supra,* in light of the amendments to §§ 33(a) and (b) in 1959, 73 Stat. 391 (1959) and the 1972 Amendments to the LHWCA, principally § 5(b), insulating the employer from liability for "such damages" of an employee entitled to compensation under the Act. In this connection, and with respect to this the overriding issue presented in this appeal—whether the effect of the assignment on petitioner's rights should be avoided as a matter of fairness or public policy—the Second Circuit Court of Appeals held that the petitioner had been "afforded six months to bring his own suit" and that the "six month time bar" was not "unreasonable or harsh under the circumstances" (p. 960). Thus, the Court of Appeals treated the *Czaplicki* "exception" as limited to the "situation" presented in that case, where § 33(b) of the LHWCA, prior to 1959 and by reason of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), meant that the § 33(b) assignment, if asserted by the stevedore, would result in a "defense" by the shipowner that the employer was liable for indemnity for all of the longshoreman's damages (at 960).

On June 16, 1980 petitioners Rodriguez and Perez applied for writ of certiorari. This application was granted October 6, 1980, presumably under 28 U.S.C. § 1254(1) (1948) on grounds of a conflict between the Second Circuit's

Rodriguez holding and the decision of the Fourth Circuit Court of Appeals in *Caldwell* v. *Ogden Sea Transport, Inc.*, (and related cases), 618 F.2d 1037 (March 27, 1980).

The questions accepted by this Court for review concede the fact of assignment and propose that the petitioners' right to sue the shipowners be "deemed reassigned" on account of the "failure or refusal"[12] of the employer or its insurer to sue,[13] resulting from the presumed existence of a "conflict of interest" between petitioners and their employers. Petitioners urge such result as a matter of compulsion on alleged "equitable" considerations, or in order to serve the "purposes of the Statute", which petitioners say is "for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages" (Petitioners' Brief, p. (i), Question 3).

III.

Summary of Argument

Respondents respectfully sumbit that a suit brought pursuant to § 5(b) of the LHWCA must be "in accordance with the provisions of section 933 of this title" and, therefore, can only be instituted in the name of the injured longshoreman within six months of his acceptance of compensation under an award, § 33(b). Failure to commence an action within such time divests the longshoreman *absolutely* of "all right . . . to recover damages" against the vessel. Thereafter, suit may only be maintained in the name of the statutory assignee, to whom "all right" of the longshoreman has been assigned under § 33(b) of the Act.

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12. If the petitioners' attorneys' affidavits are incompetent to prove the assignee's motive for not bringing suit, *and they are*, the issue is not the significance of a "refusal" but a *"failure"* to sue.

13. Subrogated to the interests of the employer by virtue of § 33(h).

Accordingly, where a § 33(b) assignment has occurred and suit is brought in the name of the longshoreman, "the vessel" may assert as a *substantive* defense that the named plaintiff is without standing to maintain the action. That such defense is substantive in nature and, therefore, not limited to and controlled by Rule 17(a) Fed.R.Civ.P., is a conclusion mandated by well-established principles of statutory interpretation which require the courts to construe statutes according to their plain meaning. It is further compelled by recognition that, by virtue of the 1972 Amendments to the Act, there is no longer basis for a "judicial solution" which either denies effect to the assignment on ground of conflict of interests or which seeks to reverse the assignment by permitting reassignment or ratification by the statutory assignee. With respect to conflict of interests, the 1972 Amendments removed the source of the conflict which had earlier provided impetus for the so-called "conflict of interest exception" in this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956) and made clear Congress' intention that whatever conflict remained could be tolerated in light of the 1959 Amendments providing the longshoreman with six months to bring suit free and clear of any control by his employer. Finally, Congress' objectives in enacting the 1972 Amendments and the effect of those Amendments on the role of the third party suit militate against affording to longshoremen a completely unrestricted right of suit and support a decision by this Court interpreting the six month provision in § 33(b) as a "time bar" with respect to suits brought in the name of the longshoreman.

IV.

Argument

Introduction

The statutory provision at issue on this appeal, § 33(b) of the LHWCA, was last before this Court in *Czaplicki* v. *The Vessel "SS HOEGH SILVERCLOUD"*, 351 U.S. 525 (1956). In that decision, the Court denied effect to the assignment provision of § 33(b), a result which was, at that time, absolutely required to ensure the continued viability of the longshoreman's third party action when compensation benefits were entirely inadequate. As § 33(b) then read, assignment to his employer of "all right" of the longshoreman to institute such third party suit occurred as soon as he accepted compensation under an award; and, by virtue of the Court's decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp., supra,* granting a right of indemnity to the shipowner against the longshoreman's employer for damages recovered in the third party suit, the stevedore employer's interests were clearly best served if no third party action were brought. As Justice Black noted in his dissent in *Ryan,* 350 U.S. at 144-45 "employers [would] not be eager to finance suits against themselves" (*Id.* at 145). Avoidance of suit, of course, could easily be accomplished by the employer "forcing an award"[14] and gaining control of the employee's third party right as a result of the assignment provision, by merely refusing to pay compensation on a voluntary basis as required by § 14 of the Act. This right could then be "compromised" pursuant to § 33(e) to the disadvantage of the employee.

The case now before the Court arrives in a radically different posture. By amendments enacted in 1959 (73

14. See *American Stevedores Inc.* v. *Porello,* 330 U.S. 446, 455 (1947).

Stat. 391) and 1972, Congress not only rectified the specific problems of § 33(b) addressed in *Czaplicki,* but also fundamentally altered the role of the third party suit by making it the secondary source of "compensation." No longer, as a result of the § 5(b) insulation of the employer from claim for an employee's damages by shipowners, is a longshoreman's suit threatened by any conflict between his interests and those of his employer. Since 1972 and the repeal of the *Ryan* indemnity action, the employer has no motive to interfere with and gain control over its employee's suit. Nor, since 1959, has the employer had the power to do so because § 33(b), as amended, affords longshoremen six months following acceptance of an award of compensation in which to bring suit, free and clear of any control by their employers.

While Congress took clear steps to ensure the *viability* of the third-party suit, it enacted equally clear measures in 1972 designed to *discourage* their volume. By vastly increasing the compensation benefits payable to employees by their employers, Congress diminished the value of the third party suit to longshoremen while intending to increase the incentive for stevedore employers to promote safer working conditions by proposing to "assur[e] that the employer bears the cost of unsafe conditions". S. REP. NO. 92-1125, 92nd Cong., 2nd Sess. 1 (1972). See also H.R. REP. NO. 92-1441, 92nd Cong., 2nd Sess. 1 reprinted in [1972] *U.S. Code Cong. & Ad. News* 4698, 4701-03. And, of course, Congress limited the liability of shipowners in suits by longshoremen by eliminating the unseaworthiness remedy.

The cumulative effect of Congressional activity since 1956 has thus been two-fold: (1) the courts need no longer be concerned with "saving" the third-party suit, the survival of which has been assured by the removal of the *Ryan* "conflict of interest" and by the six month provision in § 33(b); (2) the courts are no longer required to, and,

indeed, should not, give the traditional freest reign to longshoremen's personal injury actions for fear that compensation benefits will be inadequate. Petitioners' argument resolutely ignores these developments and urges that the Court apply *and greatly extend* its decision in *Czaplicki.* They argue not for the right of a longshoreman to bring suit, but for that right to be completely unrestricted—notwithstanding Congress' clear directive contained in the unambiguous language of § 5(b), that the right of the longshoreman to bring suit in his own name be limited to instances where there has been compliance with the six month provision of § 33(b).

On the record of this proceeding, there are, strictly speaking, only two issues. The first is whether the assignment provision of § 33(b) affords a defense *at all* to shipowners where the stevedore employer, or its subrogated insurer, has failed to bring suit for whatever reason on its assigned cause of action. In short, petitioners first urge that there is no "assignment" defense and hence, no basis for objection by respondents, or the statutory assignees, to suits proceeding in petitioners' names because: (a) failure to sue, for whatever reason, constitutes a waiver by the stevedore of its right of suit, which operates in favor of the employee who thereby regains the right to sue in his own name; or (b) that there is a presumed conflict between the interests of the stevedore and its employee which, as a matter of law, requires that the statutory assignment provision of § 33(b) not be given effect.

The second issue raised by petitioners presents an alternative argument—*viz.,* assuming the assignment defense does exist, that it provides to shipowners only a purely procedural defense, one limited in its reach to, and controlled by, Rule 17(a) Fed.R.Civ.P.—a defense which, according to petitioners, can and should be overcome by adoption of the procedural techniques sponsored by the Fourth Circuit

Court of Appeals in *Caldwell* v. *Ogden Sea Transport Inc., supra.* By arguing the correctness of the *Caldwell* result, petitioners seek, at least, a reversal in order to have the opportunity to properly establish as a matter of record in these cases whether the statutory assignee will sue, which petitioners would have determined by means of a Rule 19(a) Fed.R.Civ.P. joinder, as suggested by the *Caldwell* court (618 F. 2d at 1046), or by soliciting and receiving by some other means a "formal signal" (*Id.*) of intention from the assignee.

This Court may well determine, as did the Second Circuit Court of Appeals, that time has long passed for petitioners to avail themselves of such procedural steps, since they did nothing of an effective or competent nature to secure respondents against the threat of multiple claims as a result of the injuries in suit, despite having had ample opportunity to do so (*Rodriguez,* 617 F.2d at 958). While the record of these cases provides basis for a result of this kind, such a determination will achieve a result far too narrow to have any impact beyond those cases which are subject to this proceeding. In respondents' respectful submission, the Court *must* also consider whether the existence of a valid § 33(b) assignment defense is *procedural* only or, whether, as respondents' contend, that by virtue of §5(b) of the Act, suits by longshoremen against shipowners subject to the Act's assignment provision are to be deemed "time barred" (*Rodriguez,* 617 F.2d at 960) on *substantive* grounds so as to prevent longshoremen (but not their employers or their compensation insurers) from instituting suit after the six month period, notwithstanding any attempted "reassignment" or "ratification" by the stevedore employer. It is obvious that any § 33(b) assignment defense bottomed on Rule 17(a) Fed.R.Civ.P. is voidable by recourse to any one of the procedures which that rule provides, in order to prevent dismissal of action in the name of the original plaintiff,

who at the time suit is begun is not the "real party in interest." It is respondents' contention that since there is, in fact, *no* "conflict of interest" today between a §33(b) assignee and an employee, any assignment defense so limited will be entirely ineffective.[15]

It is respectfully submitted that the *real* conflict between the *Rodriguez* and *Caldwell* decisions is to be found in their differing perception as to whether the nature of the assignment defense is substantive or procedural, since both decisions concede the *existence* of the defense. The importance of resolution of this issue by the Court is underscored by the fact that, in the aftermath of the *Caldwell* decision, and relying on the ambiguous language of the Second Circuit Court of Appeals in *Rodriguez,* two District Courts in the Southern District of New York have permitted suits instituted by longshoremen after the six month period prescribed by § 33(b) to be "restored" to their original postures through the devices of reassignment or ratification under Rule 17(a).[16]

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15. There is no interests conflict in what is perhaps the typical case where the assignee is the stevedore's insurer. The latter has, of course, no motive *not* to "ratify" or "reassign" a suit subject to § 33(b) arising from any fear of antagonizing not its own but the stevedore's customers. See *Rodriguez,* 617 F.2d at 960. Both the stevedore and its insurer have interest in recovering the incurred compensation liability through the third party suit.

16. Thus, the district court in *Motta* v. *Resource Shipping & Enterprises, Inc.,* No. 76 Civ. 5217 (S.D.N.Y. 1980), (Tenney, J.) held that a letter from the stevedore's insurer "ratifying" a suit subject to § 33(b) on condition that the insurer approve any settlement, that its "lien" be protected and that it not be liable for attorneys' fees, litigation expenses or court costs, was "an adequate defense to the defendant ship company's claim that the suit was not instituted by the 'real party in interest'." In *Marullo* v. *Rhederei Richard Schroeder, K.G.,* No. 79 Civ. 3757 (S.D.N.Y. 1980), the Honorable Charles Goettel held that an almost identical letter was "probably insufficient" ratification, but held that the same constituted a valid reassignment. The *Motta* decision, which to our knowledge, has not yet been reported, is included as an appendix to this brief.

Respondents contend that since passage of the 1972 Amendments the assignment defense is substantive; that shipowners are entitled to the protection of "their" section of the Act, § 5(b) which specifically provides that suits by employees covered by the Act must be brought "in accordance with the provisions of § 933 of this title." Respondents submit that as a matter of settled rules of statutory construction, the § 5(b) incorporation of § 33(b) admits of no other interpretation than that the Act contains a six month "time bar" which is a constitutive element of the longshoreman's § 5(b) suit; and that it is neither "unreasonable or harsh" (*Rodriguez,* 617 F.2d at 960) that the longshoreman be absolutely divested of the right to bring suit thereafter. This is, moreover, the only reasonable interpretation to be given to § 5(b) and § 33(b) of the Act, having regard to the *real* value of the suit to *him* in the wake of the 1972 Amendments as well as the intention of Congress to diminish the volume of third party suits by longshoremen by that most effective means—vastly increasing compensation benefits.

POINT I

NO CONFLICT OF INTERESTS SUFFICIENT TO AVOID THE EFFECT OF LHWCA § 33(b) CAN EXIST

This case is a matter of first impression and respondents believe that prior precedent is useful, not for purposes of determining what is now law, but in order to understand *why* the law once was unquestionably that § 33(b) was of no effect in any longshoreman's case after *Ryan* indemnity, and at least until amendment to § 933(a) and (b) in 1959; and, further, why there was once, *perhaps,* some justification for excusing compliance with § 33(b) in those LHWCA cases in which indemnity was *not* a factor. In *every* longshoreman's case, after indemnity against stevedores was allowed, there was a conflict of interest between such employee and his employer by virtue of the fact that a suit by a stevedore on a § 33(b) assignment would soon become a suit by such employer against itself.[17] This interests conflict was avoided absolutely in *Czaplicki, supra* by this Court's refusal to give § 33(b) effect in *Ryan* indemnity cases, and to an extent not strictly relevant here, "interests conflict" may have been completely overcome by the 1959 Amendments. Since the *Czaplicki* conflict of interests exception was unquestionably the product of the *Ryan* indemnity action, it cannot have general relevance to § 5(b) cases today, following the legislative repeal of *Ryan,* since in only a few cases can a § 33(b) assignment raise prospect of an employer's suit against itself.

The second consideration which perhaps once justified excusing compliance with § 33(b) was the belief that third parties (who were once in all cases, including those brought

17. Again see, *Ryan,* 324 U.S. at 144-145, (dissenting opinion. Black, J.).

against shipowners, strangers to the Act's coverage) ought not have standing to assert an assignment defense, at least not where it was clear that the employer did not intend, for whatever reason, to sue. This approach, best articulated in *Potomac Electric Power Company* v. *Wynn*, 343 F.2d 295 (DC Cir. 1965), and in *The Owen*, 43 F. Supp. 897 (E.D.Pa. 1942), was clearly also motivated by an appreciation of the importance of the third party action to injured employees, in light of the inadequacy of the benefits the Act formerly provided. Today the Act's benefits are not inadequate and shipowners, as distinguished from other third parties, are no longer strangers to the Act's coverage.

Petitioners' argument for a presumed[18] conflict of interest sufficient to avoid application of § 33(b) is said to rest upon this Court's decision in *Czaplicki* v. *The Vessel "S.S. HOEGH SILVERCLOUD", supra.* In fact, petitioners fundamentally misunderstand that decision by failing to appreciate that the case was inextricably bound up with *Ryan* indemnity, and the significance of the fact that the Court, aware of the post-*Ryan* interests conflict problem, proceeded with greatest caution in achieving a result in conflict with the clear provision of an Act of Congress. This is plain from the fact that the Court, far from establishing this exception as a presumption to be grafted onto § 33(b) in every LHWCA case,[19] noted that "normally, [the employee's] interest will not be inconsistent with that of the assignee" (351 U.S. at 531); and specifically predicated its decision on the "peculiar facts" therein (at

18. Because they failed to adduce any competent evidence establishing that an interests conflict exists, petitioners, perforce, rely upon a *presumed* conflict said to exist by virtue of the "fact" that stevedore employers will not bring suit against shipowners for fear of antagonizing their customers. (Petitioners' Brief, pp. 6-7).

19. The LHWCA was extended to private employees in the District of Columbia by Act of May 17, 1928, 45 Stat. 600. See, D.C. CODE ANN. § 36-501.

533)—*viz.* that the vessel owner and employer were each insured by the same insurance company. The fact that it was left to the Third Circuit Court of Appeals in *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958) to *presume* a conflict of interest in *all* third party suits to which *Ryan* applied is testimony to this Court's caution, when required to do so in order to achieve a necessary[20] result, in ignoring the unequivocal language of an Act of Congress.[21]

But the post-*Czaplicki* characterization of the conflict of interest exception as a rebuttable presumption in *Johnson* v. *Sword Line, Inc., supra,* was *also* wholly motivated by concern for the effect of *Ryan* on the third party suit. Indeed, the *Johnson* court's decision (257 F.2d at 545-546) leaves no doubt that it was based entirely upon the *unavoidable* conflict of interest resulting from the combined effect of *Ryan* and § 33(b) as it then read. *Johnson* was decided in 1958, prior to Congress' 1959 Amendment to § 33(b) deleting the automatic assignment provision and providing for the six month "grace" period following an award. It is surely arguable that, by this enactment alone, Congress intended to overcome the problem addressed in *Czaplicki* and *Johnson* by affording to the longshoreman himself means of avoiding the statutory assignment (by instituting suit within the six month period) and thereby obviating need for

20. Necessary (a) because of the formerly inadequate level of benefits and the interests conflict problem created by the 1938 Amendments to § 33(b) *and* (b) because the Court's preliminary approach, reflected in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) and *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 412 (1953), excluding the possibility of any § 33(b) conflict, by proscribing contribution from a stevedore to a shipowner (*Halcyon*) and guaranteeing even a negligent stevedore recovery of its "lien" (*Pope & Talbot*), worked, but only at the expense of imperiling the safety of longshoremen.

21. The Court's restraint in *Czaplicki* is especially noteworthy when it is recalled that the Court was being asked to rectify a conflict which could not be said to have been within the contemplation of Congress when § 33(b) was enacted, having arisen by reason of judicial (*Ryan*) rather than legislative action.

its avoidance by means of a presumption of conflict of interest. In any event, Congress unquestionably destroyed any remaining basis for the interests conflict exception as a rebuttable presumption by the 1972 legislative repeal of the *Ryan* indemnity right.[22]

Respondents submit that not only is the particular conflict of interest asserted by petitioners insufficient to avoid giving effect to the Act's assignment provision, but that a conflict of interest is *never* sufficient to do so. Respondents content no less than that the 1972 Amendments to the Act clearly indicate that the conflict of interest exception, even on facts akin to those presented by *Czaplicki*—where by virtue of the fact that the § 33(b) assignee is also the § 5(b) "vessel," suit on the assignment will not be brought—can no longer serve to avoid the assignment provision of § 33 (b). As this Court held recently in *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), Congress in 1972 codified this Court's decisions in *Reed* v. *Steamship Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731 (1967) as part of § 5(b) of the

22. What remains as a conflict of interest in the typical case, where the longshoreman's employer is an independent contractor, is the alleged motive of stevedores not to antagonize their customers. This argument was dealt with in *Hernandez* v. *Costa Armatori, S.p.A.,* 467 F. Supp. 1064, 1067 (EDNY 1979) in which the district court held:

> "Here plaintiff claims that the stevedore was naturally reluctant to bring action against the vessel owner for 'fear of damaging customer relationships.' *But this is not the kind of matter that Congress could have viewed as sufficient to invalidate the assignment. Such a conflict has always been inherent in the statutory scheme.* Presumably every stevedore would prefer not to give offense to its customer." (Emphasis added).

This holding was affirmed by order of the Second Circuit Court of Appeals on March 19, 1980 for the reasons stated in *Rodriguez.* 622 F.2d 573.

Act.[23] It would seem that since Congress specifically allowed suit by an LHWCA employee against his employer, *qua* shipowner, yet required that suit, too, to be "in accordance with" § 33(b), that Congress intended the § 33(b) assignment to be given effect notwithstanding the existence of a conflict of interest, guaranteed to exist in every such § 5(b) case. From this, it must be assumed that Congress was prepared to tolerate whatever conflicts of interest remained after the repeal of *Ryan* because of the longshoreman's ability to *prevent* such conflict from arising by instituting suit in his own name within six months of receiving an award.

23. Utilizing negative language, Congress provided: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U.S.C. § 905(b). A review of the accompanying Congressional documents confirms that Congress intended "to treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury in its capacity as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading or unloading services." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. at 265. See, also, S. REP. NO. 92-1125, at 11-12 (1972).

POINT II

PETITIONERS DID NOT REGAIN THE RIGHT TO BRING SUIT IN THEIR OWN NAMES BY REASON OF THE STATUTORY ASSIGNEES' FAILURE TO BRING SUIT.

Petitioners' argument that suit may be instituted in the names of the injured longshoremen after expiration of the § 33(b) six month period "whenever it is evident that the employer, for whatever reason, does not intend to bring suit" (Petitioners' Brief, p. 17) depends entirely on the decision of the District of Columbia Circuit Court in *Potomac Electric Power Company* v. *Wynn, supra,* and (although not cited) upon *The Owen, supra.* These cases were motivated by "no standing" considerations: that there was no reason for third parties to be concerned whether they were sued by the employer *or* the employee. That these decisions were also based on concern for the inadequacy of the then existing compensation benefits is also apparent.

Potomac did not involve a maritime employee and the provisions of the LHWCA therefore applied only by extension of the Act's coverage to private employers in the District of Columbia. Hence, this Court's decision in *Ryan* and issue of a *Ryan* indemnity interests conflict were not properly a factor in the court's decision to deny effect to the assignment provision. While admitting of the absence of a conflict of interest,[24] the court nevertheless held that

24. The majority opinion alluded to a possible conflict of interest raised by counsel's suggestion that the employer had failed to sue because he feared a *Ryan*-type indemnity action. But the court concluded that "unlike *Czaplicki,* the record does not support the sole inference that the employer (or his subrogee) refused to sue the third party because its interests were identical with that party and opposed to the employee's . . . [*I*]*t is equally plausible from the record before us that the employer sincerely believed that PEPCO was not liable for the employee's injury.*" *Potomac,* 343 F.2d at 297 (emphasis added).

"the Act's purposes to benefit the employee, as interpreted by *Czaplicki,* and supplemented by the 1959 Amendments" (*Potomac,* 343 F.2d at 298) could only be served by interpreting the employer's declination to sue as a "waiver" of the statutory assignment operating in favor of the employee (*Id.*).

Potomac would surely appear to have been wrongly decided. It disregarded entirely the plain language of § 33(b) by effectively giving employees and employers a concurrent right to sue after the six month period, notwithstanding that § 33(b) provides for assignment of "*all* right" of action to the employer after such time. More importantly, it purported to "build" upon this Court's *Czaplicki* decision, despite the fact that *Czaplicki* had no application whatsoever in the absence of the *Ryan* indemnity action which was only available to shipowners.

But in terms of the 1972 Amendments to the Act, upon which the decisions in the cases before this Court must, of course, be based, *Potomac* is not so much wrong as utterly irrelevant. The "purposes of the Statute" considerations which the *Potomac* court brought to § 33(b) manifestly did *not* include those purposes which might have had effect on the rights of third parties. Properly so; third parties were not included in the Act's coverage in 1965. Potomac Electric Power Company *is still not* a party to Act. But shipowners *are.* Section 5(b), requiring that a longshoreman's suit be "in accordance with" § 33 of the Act, applies to "a vessel" and no amount of stretching of the Act's definition of that term[25] can make a public utility "a vessel." Thus, *Potomac, supra,* is totally irrelevant; and so is Petitioners' argument that *Potomac* is a part of the "delicate balance" (Petitioners' Brief, p. 23) with which this Court was concerned in *Edmonds, supra.*

The Fourth Circuit Court of Appeals' decision in *Caldwell* v. *Ogden Sea Transport* echoes *Potomac* in its commit-

25. 33 U.S.C. § 902(21).

ment to "building on (sic) the fundamental point in *Czaplicki*" which is said to be "that notwithstanding a statutory assignment of the longshoreman's right of action, that right may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason" (*Caldwell,* 618 F.2d at 1046). *Caldwell* is, of course, a more sophisticated version of *Potomac* since it recognizes that the vessel owner has, at the very least, a valid defense in the face of a § 33(b) assignment by virtue of Rule 17(a) Fed.R.Civ.P. But the court's characterization of that defense as procedural only (and therefore easily overcome) is unquestionably designed to effectuate the *Potomac* result, without denying due process to the statutory assignee, or permitting the shipowner to face multiple liability on the same claim.

The *only* basis for characterizing the assignment defense as procedural only—a characterization which ignores the plain words of § 5(b) that third party suits must be brought "in accordance with section 933 of this title"—is a perception that *any* restriction on the third party suit cannot be tolerated. This perception rests, in turn, upon a more fundamental evaluation of the third party suit as being salutary to the longshoreman, and hence not to be limited under any circumstances.[26]

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26. As the *Caldwell* court explained:

> ". . . Ordinarily, therefore, it is likely that the interests of both longshoreman and assignee in having their substantive rights pursued and of the third person in facing a single action will be achieved under LHWCA.
>
> But LHWCA does not yet deal directly with certain practical problems that may interrupt or wrench these expectations. These can arise whenever by design or inadvertence the longshoreman fails during the statutory period to prosecute the claim while the right of action is exclusively his. Following this failure, the assignee may, for a variety of reasons, not then itself prosecute the claim. It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may

Thus, the *Caldwell* court assumed that a "solution" should be found to enable the longshoreman who has failed to sue within the six month period to pursue his former right of action. Its analysis fails to admit of the possibility that Congress did indeed intend "that the longshoreman's substantive right might be lost" (618 F.2d at 1045) through the *combined* inaction of the employee (who fails to bring suit within the time period afforded by the Act) and the statutory assignee; that the incorporation by Congress of § 33(b) into § 5(b) does "deal directly" (*Id.*) with the *legal* problem created by a longshoreman's failure to sue; and that the 1972 Amendments were intended to provide shipowners with a substantive defense where suit is brought other than in the name of the statutory assignee. The *Caldwell* court, compelled by a special "vision" of the third party suit, which in no way accords with Congress' objectives in enacting the 1972 Amendments, nor with the real achievements of the third party suit as it exists today, created a "solution" to the assignment "problem" which effectively does away with the assignment defense.

Respondents contend that there is no reason for this Court *not* to interpret § 5(b) as it was enacted by Congress. Congress specifically provided that § 5(b) suits be brought

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have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar. Under all of these, and to precisely the same degree under all, *the longshoreman faces a practical problem for which LHWCA provides no direct solution: forcing action by the assignee, or somehow retrieving the right of action. While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply through inaction of the assignee until the claim is barred from prosecution by anyone. What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason.*" 618 F.2d at 1045 (emphasis added).

"in accordance with" § 33 and this Court, as it recently noted in *Director, Workmen's Compensation Programs* v. *Rasmussen,* 440 U.S. 29, 47 (1979), is bound by what Congress has said:

> "Congress has put down its pen, and we can neither rewrite Congress' words *nor call it back 'to cancel half a line.'* "[27] (Emphasis added).

Moreover, the "in accordance with" provision of § 5(b) was drawn in anticipation of suits under § 5(b) against shipowners who under the Act are also employers, which means no less than that Congress intended that the six month provision in § 33(b) be a constitutive element of the longshoreman's § 5(b) action, making claim to non-compliance with § 33(b) a matter of substance rather than procedure. This conclusion is compelled because of Congress' clearly expressed intention in 1972 that "the rights of an injured longshoreman . . . should not depend on whether he was employed directly by the vessel or by an independent contractor." H. R. REP. NO. 92-1441, at 7. If the assignment defense is treated as procedural only, the employee of an independent contractor will be able to overcome it by the procedural devices of Rule 17(a) Fed.R.Civ.P., but the employee of a stevedore/vessel owner will not.[28] Such result would conflct with the "equal rights" standard espoused by Congress in 1972.

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27. This dictum is but one example of this Court's well-established rule of statutory interpretation as enunciated in *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920): "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. *If that be plain, it is the duty of the courts to enforce the law as written,* provided it be within the constitutional authority of the legislative body which passed it." (Emphasis added.)

28. Obviously, in the latter situation, the statutory assignee will *not* agree to ratify or reassign the cause of action or consent to be joined as a party plaintiff. And it is unlikely that it could be joined as an involuntary plaintiff *against itself* under Rule 19 Fed.R.Civ.P.

Ordinary rules of statutory interpretation require this result, but to the extent that this Court will be assisted by considerations outside the plain language of the Act, it is appropriate to proceed to consider the objectives of Congress in enacting the 1972 Amendments. Of the highest priority was Congress' desire to promote on-the-job safety for longshoremen. Since the third party suit today may tend to promote *unsafe* working conditions (see *infra* at pp. 38-43), this Court need not feel any reluctance to strictly abide by the language of § 33(b) and § 5(b) of the Act and to hold that the assignment defense is substantive.

An equally clear objective of the 1972 Amendments was to greatly increase the amount and range of compensation benefits payable, and, by correspondingly diminishing the value of the third party suit to the longshoreman, to make compensation the preferred means of making an injured longshoreman whole. See *Canizzo* v. *Farrell Lines, Inc.*, 579 F.2d 682, 687-88 (2d Cir. 1978, dissenting opinion, Friendly, J.) and, by so doing, to reduce the swell of litigation. Again, it is wholly consistent with this objective to place upon Congress' incorporation of § 33(b) into § 5(b) an interpretation which treats the six month provision as a "time bar" with respect to suits brought in the name of the longshoreman. The employee who fails to sue within the given period is likely to be one whose injuries have been fully compensated and/or who is without a valid claim against the shipowner as recognized by the amended Act (limiting the third party suit to ship's negligence). In sum, a restriction on the third party suit is properly to be judged by the extent to which these suits achieve the results which Congress intended them to achieve: to provide additional compensation to the injured man through an award of damages and to encourage safety. Longshoreman's § 5(b) cases today may typically do neither.

POINT III

CONSIDERATIONS OF POLICY SHOULD LEAD THE COURT TO CONSTRUE § 5(b) ACCORDING TO ITS UNAMBIGUOUS TERMS

A. A Comparison of Benefits Available Under the Act and Recoverable Damages

The value of the third party suit *to the longshoreman* has been significantly diminished by virtue of the combined effects of (a) the 1972 Amendments to the Act, which vastly increased compensation benefits payable by his employer and (b) judicial interpretation of the manner in which any recovery in the action is to be distributed among the three "interested" parties: the longshoreman, his attorney and his employer (or its compensation carrier).

The Act extends benefits today of unprecedented generosity. The present maximum is $426.26 per week, 200% of the national average weekly wage, (§ 6(b)(1)(D)), subject to which an injured longshoreman is entitled to 66⅔% of his average weekly wages in calculating benefits for permanent total disability § 8(a), temporary total disability § 8(b) and permanent partial disability § 8(c). The Act also provides temporary partial disability benefits, based on two-thirds of any reduced earnings capacity caused by an injury § 8(e).[29] Permanent partial disability under § 8(c), the additional benefits which petitioners herein received under the "awards" which triggered the

29. Temporary partial disability benefits under § 8(e) are limited to a specific duration and are payable ". . . during the continuance of such disability, but shall not be paid for a period exceeding five years."

§ 33(b) assignments,[30] are cumulative of those payable under §§ 8(b) and (e). As a result of this spectrum of benefits the Act, as interpreted liberally by the OWCP, extends the very real prospect of a compensation entitlement significantly greater than what, in a typical case, a longshoreman can prove in way of special damages. In addition, § 8(c) benefits for permanent partial disability are properly comparable to general damages while death benefits under § 9(b) extend compensation where no damages would be recoverable.

Any plaintiff claiming damages in a third party suit for lost future wages can recover only those sums which he can prove might reasonably be expected to be lost, not until the end of his life, but to the end of his work-life expectancy. But under the Act, § 908(a) total disability benefits at the rate of an employee's average weekly wage shall be paid ". . . during the continuance of such total disability." This would seem to admit of no interpretation other than entitlement for life, not to age 65 or some other time which provides basis for estimate of work-life expectancy.[31]

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30. The compensation benefits paid to petitioners Rodriguez and Perez may be seen as deceptively low, in view of the fact that wage rates in the port of New York and elsewhere have risen dramatically since 1973 when their benefits, based on their wages at the time of injury (1973) were calculated. For the contract year beginning October 1, 1980 longshoremen in New York, the Atlantic and Gulf coasts are paid $11.60 per hour and are entitled to guaranteed annual income ("GAI") by virtue of the collective bargaining agreement if enrolled in the GAI plan. Enrollment depends upon having worked 700 hours in the year prior to the beginning of the existing contract. The income guarantee is for 2080 hours and amounts to $24,128 yearly, making a GAI longshoreman's benefits more than $300 per week.

31. So generous are the benefits for permanent disability under the Act that, even in the case where a longshoreman recovers damages in the third party suit, he is entitled to claim "deficiency" compensation after "exhaustion" of the *net* third party recovery, § 33(f)

By virtue of the Court's recent decision in *American Export Lines, Inc.* v. *Alvez,* —— U.S.——, —— S.Ct.——, 64 L.Ed.2d 284 (1980) a longshoreman's wife may recover damages in her own right for loss of consortium. But the Act also extends benefits to wives of longshoremen. The widow of a longshoreman who sustains permanent total disability due to "the injury" and who thereafter dies from causes "other than the injury" (ie., for any other reason) is entitled, should she not remarry, to "50 per centum of the average wages of the deceased . . . during widowhood," § 9(b). These benefits are *not* subject to the disability benefits maximum (now 200% of the national average weekly wage) found in § 6(b)(1). See, *Director, Workers' Compensation Programs* v. *Rasmussen, supra.* Thus, in the case of an injury causing total disability[32] followed

(see also *Nacirema Operating Company* v. *Oosting,* 456 F.2d 956 (4th Cir. 1972) *cert. den.* 409 U.S. 980 and cases cited therein, *Bell* v. *Calumet Harbor Terminals, Inc.,* 6 BRBS 307, B.R.B. No. 76-494 (July 18, 1977) provided that the case proceeds to judgment or his employer consents in writing to the third party settlement, § 33(g). In other words, a longshoreman can assure himself, regardless of the outcome of the third party suit, of whatever he is entitled to in compensation and his third party suit can be, and often is, nothing but a trial balloon. Thus, assuming that a longshoreman has a net recovery equal in amount to his total compensation entitlement, *his* only stake in the third party suit is the amount of interest he would earn on a lump sum damage award which he could, however, also earn on his compensation benefits under § 8(b)(i)(A) and (B) of the Act. Interest on the net judgment or settlement is a double recovery. The real parties with a stake in such action are clearly his employer, whose compensation liability is suspended until "exhaustion" of the net damages recovered, and the longshoreman's attorney. If that employer was, as is typically the case, concurrently negligent, he not only recovers his incurred compensation expense as a "lien" on proceed but is also relieved of future compensation liability.

32. What constitutes total disability for purposes of the Act is, as always, more liberally construed than in suit for damages. Such disability is not measured by physical condition alone. Consideration must be given to an employee's age, education, industrial history and availability of employment which he can perform in making such a determination. *American Mutual Insurance Co. of Boston* v. *Jones,* 426 F.2d 1263 (D.C. Cir. 1970); *Cunnyngham* v. *Donovan,* 328 F.2d 694 (5th Cir. 1964).

by death from another cause, the widow will receive an increase of benefits up to 66⅔% of the employee's wages, if high enough during his employment to have been subject to a § 6(b)(1) maximum.

The Act's benefits also most liberally compensate employees whose injuries cause a permanent or temporary partial disability. Disability under the Act is an economic concept based on a medical foundation, *Perini Corp.* v. *Heyde,* 306 F. Supp. 1321 (D.R.I. 1969). If "disability"[33] is proven, economic loss is presumed, *Travelers Insurance Company* v. *Cardillo,* 225 F.2d 137 (2d Cir. 1955), *cert. den.* 350 U.S. 913 (1955). Thus, in determining disability under the § 8(c) schedule, economic factors are not taken into consideration. *Conteh* v. *Greyhound Lines, Inc.,* 8 BRBS 874, B.R.B. No. 78-365 (Sept. 29, 1978); *Bachich* v. *Seatrain Terminals of California,* 9 BRBS 184, B.R.B. No. 78-289 (Nov. 2, 1978). The economic basis needed in a § 8(c)(21) instance, which like § 8(e) benefits for temporary partial disability requires some proof of economic loss, (§ 8(h)) may properly be only in the nature of diminished opportunity for advancement in the same or related employment, which concept seems grounded upon considerations of competition in the marketplace. See, *Bath Iron Works Corp.* v. *White,* 584 F.2d 569 (1st Cir. 1978). Consideration of marketplace factors would appear dubious in the typical case in view of the unioniza-

33. Typically based on a percentage "loss of use" of the bodily member involved which is often expressed in terms of ranges of motion, sometimes but not necessarily based on the American Medical Association's "Guides to the Evaluation of Permanent Impairment." *Tangorra* v. *Nat'l Steel & Shipbuilding Co.,* 6 BRBS 427, B.R.B. No. 76-328 (Aug. 15, 1977). Neither medical testimony of permanent partial impairment *nor* evidence of economic loss as a result need be adduced. The OWCP can rely on subjective complaints of pain. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.,* 8 BRBS 676, B.R.B. 77-875 (Aug. 15, 1978); *Amato* v. *Pittston Stevedoring Corp.,* 6 BRBS 537, B.R.B. No. 76-348 (Aug. 29, 1978).

tion of longshoremen and the fact that job competition is based only on seniority as that plays a role in employment at the hiring hall. In view of the paucity of proof of financial loss required, permanent partial disability under the Act seems suspiciously akin to an award of general damages for loss of enjoyment of life or physical impairment, a fact perhaps best shown by the parallel availability of benefits under § 8(e) for temporary (up to five years) partial disability in which case, unlike those benefits available under § 8(c), for permanent partial disability, diminished earnings need be shown.

In terms of the amount and range of compensation available, benefits under the Act at least rival those recoverable in suits for damages. Unlike suits to recover damages, there is a statutory presumption that any claim comes within the provisions of the Act and is, therefore, compensable, § 20(a). Further, the fact that an injury or death occurs "in the course of employment strengthens the presumption that it arises out of the employment, with doubts resolved in the claimant's favor." *Vendemia* v. *Cristaldi*, 221 F.2d 103, 105 (D.C. Cir. 1955). Moreover, this statutory presumption means that death or injury resulting from aggravation of a pre-existing condition is compensable unless there is "substantial evidence" to show that such injury was *not* aggravated or precipitated by a work-related factor. *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Independent Stevedore Company* v. *O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rasinski* v. *I.T.O. Corp. of Baltimore*, 7 BRBS 1012, B.R.B. No. 77-277 (Feb. 28, 1978). See also, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951). Indeed, a covered employee can establish a new claim for compensation if some disability is caused by an "injury" consisting of nothing more than an episode of disabling pain caused wholly by an underlying, pre-existing condition. *Adkins* v. *Safeway Stores, Inc.*, 6 BRBS 513,

B.R.B. No. 76-317 (Aug. 23, 1977). The Act in all cases is to be liberally construed and when credible proof of disability is offered, even through subjective complaints only, the OWCP *must* award benefits. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676, B.R.B. No. 77-875 (Aug. 15, 1978); *Ruiz* v. *Universal Maritime Service Corp.*, 8 BRBS 451, B.R.B. No. 78-135 (May 30, 1978); *McIntosh* v. *Parkhill-Goodloe Co.*, 4 BRBS 3, B.R.B. No. 75-263 (May 17, 1976), aff'd mem. 550 F.2d 1283 (5th Cir. 1977), *cert. den.* 98 S.Ct. 766 (1978). Of course, contributory negligence is no factor.

Because of the vastly increased amount and range of benefits payable under the post-1972 Act, and because the longshoreman is not permitted a double recovery,[34] the amount of damages *he* can recover in a third party suit is of course less today than prior to the Amendments. Moreover, by virtue of the apportionment of the "recovery fund" by this Court's decision in *Bloomer* v. *Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) and the Second Circuit Court of Appeals' decision in *Valentino* v. *Rickners Rhederei G.M.b.H.*, 552 F.2d 466 (2d Cir. 1977), this Court should consider the very serious possibility that the longshoreman in a typical suit brought today will benefit *not at all* by bringing the third party suit.

In *Valentino*, a case involving a verdict less than the "lien" for compensation benefits paid by the employer, it was held that the attorney was entitled to take his entire fee out of the verdict, with the remainder going to the stevedore employer. The longshoreman, of course, received nothing. The district court also held (*Valentino* v. *Rickners Rhederei G.M.b.H.*, 417 F.Supp. 176, 179 (E.D.N.Y. 1976)), and the Court of Appeals specifically affirmed (552 F.2d at 470, n. 5), that the attorney coud not "share" any part of his fee with his client, the longshoreman, because Ethical Con-

34. *The Etna*, 138 F.2d 37 (3rd Cir. 1943).

sideration 3-8 of the Code of Professional Responsibility prohibits a lawyer from sharing legal fees with a layman.[35]

In *Bloomer,* this Court dealt with the situation where the recovery exceeded the lien and, specifically, with whether the stevedore employer could recover its entire lien free of any litigation expenses. The disposition of the Court allowed the longshoreman's attorney to take a one-third fee, based on a contingent fee retainer agreement, from the *gross* settlement and did not require the employer to contribute at all to the fee from its "lien."[36]

The *Bloomer* decision was apparently motivated by this Court's desire to place this so favored class of workmen in no better position than ordinary litigants. 63 L.Ed.2d at 222. Putting longshoremen in the same position as ordinary litigants *requires* that the attorney take his fee from the gross verdict and that such fee be borne by the longshoreman alone, at least in every case where the judgment or settlement is large enough so that this result can be achieved—*even if this requires the longshoreman to pay to his attorney the last cent of any excess.*[37] The practical effect of *Bloomer* on a longshoreman's recovery in a third party suit is the following: in any case where the attorney's

35. The Court of Appeals also pointed out that such fee-splitting "would open the way for an end-run around the rule that the stevedore must be paid in full before the longshoreman receives anything." (552 F.2d at 470, n. 5).

36. The Court specifically excepted the *Valentino* situation from this rule, see *Bloomer,* 63 L.Ed.2d at 226, n. 13.

37. This is easily demonstrated by the following example: Verdict of $60,000.00; compensation benefits: $40,000.00. Attorney receives fee of $20,000.00; stevedore receives remaining $40,000.00 in satisfaction of its lien and plaintiff longshoreman receives *nothing* out of the law suit. But he has already received $40,000.00 in benefits and is therefore, in the *same* position as an ordinary litigant who has *not* received compensation and has retained $40,000 out of a $60,000 recovery after payment of his attorney. In addition, this result avoids the "end-run" with which the Second Circuit Court of Appeals in *Valentino* was concerned. The stevedore is paid in full before the longshoreman receives anything (*Valentino,* 552 F.2d at 470, n. 5).

fee is 33⅓% and where the stevedore has a "lien" on the proceeds of suit, such suit can result in an *actual* recovery by the longshoreman *only* if the verdict or settlement amount exceeds compensation benefits paid by *more* than 50%.[38]

By virtue of its recent decision in *Norfolk & Western Pacific Railway Co.* v. *Lipelt*, —— U.S. ——, 100 S.Ct. ——, 62 L.Ed.2d 689 (1980), which requires deduction of a plaintiff's tax liability from any damage award for lost wages in a personal injury case, the Court has further "narrowed the gap" (See *Bloomer, supra*) between a longshoreman's damage recovery and his tax-free compensation benefits.

If a longshoreman exhausts his compensation remedy, which he, of course, now may do without imperiling his right to sue because of the § 33(b) six month "grace" period; and if this results in payment of compensation which is two-thirds of his reasonable expectancy in way of a damage recovery; and if for this, or any other reason, suit is not brought within the six month period, a *Caldwell* result will benefit not longshoremen, but lawyers—those representing longshoremen *and shipowners*. Under *Valen-*

38. In *Bloomer*, the settlement amount was sufficiently large that the attorney's fee did not seem an awkward percentage of the longshoreman's net recovery because plaintiff was compensated only to the extent of receiving free medical care and income replacement for the period of his total disability after the occurrence of what appears to have been a serious back injury. There is no specific "schedule" under § 8(c) for back injury. However, if plaintiff sustained an injury to his back which caused him to lose time from work after he ceased to be totally disabled, he would have had opportunity to make claim for impairment of earning capacity under § 8(c)(21) or § 8(e). He apparently did not, which may mean that a longshoreman claiming a permanent injury got benefits on basis that only a temporary injury had been sustained. There has been a documented tendency in the past for longshoremen's attorneys to lead injured employees away from compensation, in order to preserve the "value" of the third party case. This practice was specifically deplored by Congress. See, H.R. REP. NO. 92-1441 at 5. It is perhaps significant that in the *Caldwell* group of cases, not one injured longshoreman sought an award of benefits on basis of claim of having sustained a permanent impairment.

tino, a longshoreman's lawyer recovers in such case whether or not the judgment exceeds the "lien" and the alleged "plaintiff" would be but a stalking horse for the attorney's interest and that of a likely negligent stevedore.

B. The Role of the Longshoreman's Third Party Case in Promotion of Safety

Congress identified certain objectives to be met by the 1972 Amendments, among which were to more adequately meet the compensation needs of injured employees and their families and—by assuring that the employer bear the compensation cost of unsafe conditions—to strengthen the employer's incentive to provide the fullest measure of on-the-job safety. H.R. REP. NO. 92-1441, "Purpose and Background of Legislation" at p. 1. In the same document, in a discussion entitled "Elimination of Unseaworthiness Remedy," Congress acknowledged that:

> "... the number of third party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could be better utilized to pay improved compensation benefits were being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in those cases. (*Id.* at 5.)

Congress in the same document also indicated that nothing in the Act was intended to relieve "any vessels or other persons" from their duties under the Occupational Safety and Health Act of 1970,[39] 29 U.S.C. § 651 *et seq.* and that

39. The reference to vessels encompasses instances where the vessel is also the employer. The Occupational Safety and Health Act of 1970, through 29 C.F.R. § 1918 *et seq.*, the Safety and Health Regulations for Longshoring, applies to the employer. See 29 C.F.R.

it stood ready to ". . . immediately reexamine the whole third party suit question if it appears that the changes made in the present law have [adversely] affected progress in improving occupational health and safety." (*Id.* at 8).

It is axiomatic that an employer cannot be made to bear the cost of unsafe conditions if it or its insurer has a "lien" on the proceeds of a longshoreman's suit irrespective of the employer's negligence, at least if the scope of the shipowner's duty to longshoremen is not to be limited in a fashion designed to prevent just that result. It is further obvious that in terms of financial incentive, third party cases, (at least those involving negligence *per se* or statutory negligence by stevedores who fail to observe the safety precautions mandated by the Act's § 41 and the Safety and Health Regulations for Longshoring) will "relieve" stevedores from compliance with those regulations, designed to promote the safety with which Congress was concerned.

Longshoremen hurt on the job are, in instances where third party rights are involved, overwhelmingly injured aboard ships where they are typically at work with ship's gear. Few classes of workmen are engaged in situations which so readily lend themselves to "third party" liability and with that, especially in light of § 41 and the regulations, circumstances in which the employer *and* the third party may both be "negligent." In recognition of these facts, and of the need to prefer the safety of longshoremen to all else, this Court in 1956 in *Ryan* v. *Pan-Atlantic S.S. Corp., supra,* gave shipowners a right of indemnity. One purposeful effect of this decision was to make the party in the best position to prevent the occurrence of a longshoreman's injury, usually the stevedore, pay the entire loss (see, *Italia Societa Per Azioni Di Navigazione* v. *Oregon*

§ 1918.1; *Albanese* v. *N.V. Nederl. Amerik Stoomy. Maats.*, 346 F.2d 481 (2d Cir. 1965) rev'd on other grounds, 382 U.S. 283 (1965); *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660, 664, n. 6 (2 Cir. 1975). "Other persons" referred to by Congress means independent contractor stevedores.

Stevedoring Company, Inc., 376 U.S. 315 (1964)). Another was to make question of shipowner negligence largely *irrelevant.* This for reason first of the fact that shipowner's liability was overwhelming also predicated on unseaworthiness, or was based on unseaworthiness alone.[40] And, secondly, since neither the existence of an unseaworthy condition nor shipowner's negligence constituted, without more, a bar of recovery of indemnity from the stevedore,[41] shipowners' liability in the only *real* sense of that word, i.e. *ultimate* liability, depended not upon whether they were negligent or their vessels unseaworthy, but upon whether stevedores were or were not guilty of a breach of warranty. Under *Ryan* indemnity, shipowners as a practical matter were liable *only* when the stevedore *was not* negligent.

The work situation aboard ships has, of course, not changed and exactly the same potential for joint "negligence" exists today as it did under *Ryan* and, of course, before that time. Nonetheless, in at least the majority view of what constitutes negligence in § 5(b) cases, shipowners, who are often in by no means the best position to prevent accidents to longshoremen and whose "negligence" is but *a* proximate cause (and often marginally today routinely face liability for not only a longshoreman's damages,[42] if any, but for the compensation liability of the

40. As was once observed: "[i]t is hard to imagine . . . how an owner could be negligent, if the ship was not unseaworthy." *Spano* v. *Koninklijke Rotterdamsche Lloyd,* 472 F.2d 33, 35, n. 1 (2d Cir. 1973).

41. See *Italia Societa Per Azioni Di Navigazione,* 376 U.S. at 320; *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.,* 355 U.S. 563, 568 (1958); *McNamara* v. *Weichsel Dampfschiffahrts AG Kiel, Germany,* 339 F.2d 475, 478 (2d Cir. 1964).

42. "Damages" in this context should be understood as those sums which a longshoreman can prove to the satisfaction of the trier of the facts are his damages, for which he neither has, nor can obtain, benefits under the Act.

stevedore, even when *the* proximate fault is unquestionably the latter's.

Ryan indemnity worked, a fact recognized by Congress (H.R. REP. NO. 92-1441) which appreciation, we respectfully submit, was motive for the Congressional statement with respect to willingness to reassess the 1972 Amendments in light of their effect upon safety. The concern of Congress for the safety of longshoremen can be effectively served only: (1) by defining a shipowner's duty to longshoremen as extending only to those instances where either a "workmanlike"[43] or "non-negligent"[44] performance by the employer would not have prevented the occurrence of injury or (2) by separating the question of a longshoreman's right to damages in excess of what he has already obtained or is entitled to receive in compensation, from the shipowner's liability to a negligent stevedore for its compensation liability.

Definitions of the duty of shipowners to longshoremen in terms only of an appropriate *partial* reliance on the stevedore's obligations respecting safety, such as, for example, those found in § 343 and § 343(A) of the RESTATEMENT (SECOND) OF TORTS, (1966)[45] (see, e.g. *Napoli* v. [Transpacific Carriers, Etc.] *Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976)) are doomed to failure, as efforts by courts to reach through proximate fault of a stevedore in order to apprehend a remotely "negligent" shipowner will

43. The warranty of workmanlike service in maritime contracts has been held to exist independent of the *Ryan* indemnity right. *Fairmont Shipping Corp.* v. *Chevron Int. Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975). The 1972 Amendments overruled *Ryan* ". . . insofar as . . . [it] made an employer circuitously liable by . . . allowing . . . the vessel to maintain an action for indemnity against the employer." *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106, 113, n. 6 (1974).

44. As defined, at least principally, by § 41 of the Act and the Safety and Health Regulations.

45. Sections 343 and 343(A), in the context of the regulations and the stevedore's obligation under its warranty to "stop work" in the face of known unsafe conditions, to which "open and obvious" conditions these sections by their terms apply, make a shipowner's liability derivative of a breach of duty by the stevedore.

increasingly enhance the prospect of a longshoreman's recovery and, with that, the recovery by that negligent stevedore of its "lien." Yet despite the obviousness of the relationship between promotion of safety, considerations of the shipowner's duty and the question of a negligent stevedore's "lien" rights, courts persist in justifying expansive notions of when longshoremen may recover for shipowner's "negligence" upon considerations of safety, while at the same time acknowledging a negligent stevedore's alleged right to be made whole. Since it is possible that the present law actually requires a partially "negligent" shipowner to bear the "whole load" of third party damages by requiring reimbursement of a negligent stevedore, (see, *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714, 724 (2d Cir. 1978)) this Court must consider the resulting possibility that longshoremen's cases, if brought and if successful, will serve to undermine the stevedore's concern for safety; and because the stevedore has typically the best opportunity to prevent injury to its employees, that the interests of longshoremen as a group may not be served by the bringing of marginal liability (i.e. remote shipowner negligence) third party actions.[46] Suits brought by longshoremen beyond the six

46. Whether allowing a negligent stevedore to recapture its compensation liability need be seen as a requirement of the "delicate balance" of law existing in 1972 would depend on whether this Court would, in some future case, view the *Pope & Talbot* holding allowing such result to have been, like *Czaplicki*, a conflict of interests matter, and whether that case can be reconciled with *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.* 394 U.S. 404 (1969). An answer to the latter question as to whether these cases can be reconciled might be suggested by considering the holdings of the district court and court of appeals in *Joyner* v. *F&B Enterprises, Inc.*, 448 F.2d 1185 (DC Cir. 1971) in light of this Court's *Federal Marine Terminals* holding that the Act never "cut off" a stevedore's common law right to sue a third party to recover its compensation liability occasioned by the latter's fault. The stevedore's "lien," after all, was thought to be required in order to prevent a double recovery by the longshoreman *and* because stevedores, after the 1938 Amendments, in any case where there was no award, were *mistakenly* thought to be "without redress." See, *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952, Weinfeld, J.), aff'd *sub. nom.* 205 F.2d 151 (2d Cir. 1953); *The Etna*, 138 F.2d 37 (3rd Cir.

month provision of § 33(b) are more likely to be of that kind.

1943). If the alleged "lien" rule was not part of the balance, and, of course, negligent stevedores between 1956 and 1972 did *not* escape their compensation liability, the question might be whether a "lien" is required today because § 905(b) overrules *Federal Marine Terminals*. See *Landon* v. *Leif Hoegh and Co. Inc.*, 521 F.2d 736 (2d Cir. 1975) *cert.* sought (on grounds other than argued in District Court and the Court of Appeals) and denied 423 U.S. 1053 (1976) where this was suggested but not held. But see, also, *Dobbins* v. *Crain Bros., Inc.*, 567 F.2d 559, 565, n. 10 (3rd Cir. 1977). Perhaps an argument from the language of § 5(b) might be made that the 1972 Amendments overruled *Federal Marine Terminals*. The record of hearings before Congress and the Congressional documents, however, indicate the question was never considered, although as was pointed out in *Bloomer* (63 L.Ed.2d at 224 n. 10) the proscription against double recovery was commented upon in the 1972 Congressional hearings, as it had been previously, at the time of the enactment of the 1959 Amendments. To the extent, if at all, that the "lien" may be properly something more than a device to prevent a double recovery, i.e. is a property right of the stevedore in all instances to recover its compensation liability from the proceeds of an employee's suit, the Court should consider Congress' statement of intention that employers bear the cost of unsafe conditions, which seems incompatible with such interpretation of the "lien." The question of the effect of the 1972 Amendments on a stevedore's *Federal Marine Terminals* right might also properly be considered in light of this Court's justification of the result in *American Stevedores Inc.* v. *Porello, supra* (whence the "lien" problem, if it is such, springs). In that case the Court, mistakenly, in light of *Federal Marine Terminals*, rejected the argument of the stevedore that suit was barred by virtue of a § 33(a) election, since that meant what Congress could not have intended—where there was no award neither the employee nor the employer could sue and, hence, a blameless stevedore would be unable to recoup its compensation expenses. See, *American Stevedores Inc.* v. *Porello*, 330 U.S. at 445. If *Federal Marine Terminals Inc.* was overruled by the 1972 Amendments and the employer has no independent right of suit, it cannot today recover its compensation expense, if there is no award and the employee chooses not to sue. Such result is clearly incompatible with Congress' intention to encourage *voluntary* payments under the Act.

It is apparent that this question is matter for a future case and that this limited discussion is by no means adequate treatment of what may be the *essential* problem in longshoremen's personal injury cases. This footnote is the product of the writers' concern for Code of Professional Responsibility, E.C. 7-23 in light of the hypothetical argument respecting safety made herein, which responds to contrary argument concerning safety made by petitioner (see Petitioners' Brief, p. 9).

V.

Conclusion

By reason of the plain language of §5(b) and the changes in the Act since 1956; and appreciating that there is a distinction in longshoremen's cases today between what benefits longshoremen as opposed to just their attorneys (*Bloomer, supra* 63 L.Ed. 2d, at 225, n. 11); and, finally, in order to serve that objective of workmen's compensation, described during the course of the hearings before Congress in 1972 by the then Secretary of Labor Hodgson, which is to ". . . minimize, not encourge, litigation" (Hearing on H.R. 247 *et al.* before the Select Subcommittee on Labor and Public Welfare, 92nd Cong., 2d Sess., 49), this Court should affirm the judgments of dismissal on ground that the LHWCA provides shipowners a substantive defense barring suit by longshoremen after six months from acceptance of an award of compensation.

Dated: New York, New York
December 22, 1980

Respectfully submitted,

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APPENDIX

Motta v. Resource Shipping & Enterprises Co., 76 Civ. 5217 (CHT)

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 5217 (CHT)

RONALD MOTTA,

Plaintiff,

—against—

RESOURCE SHIPPING & ENTERPRISES CO.,

Defendant.

APPEARANCES

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TENNEY, J.

This case constitutes yet another episode in the enduring struggle to correctly interpret and apply problematic provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (hereinafter referred to as LHWCA or the Act). The question raised here is whether an insurance company to which a long-

shoreman's personal injury claim has automatically been assigned because the longshoreman failed to institute suit within six months of receiving his compensation award, *see id.* § 933(b), can effectively ratify the longshoreman's commencement of a damages action against the shipowner notwithstanding the plaintiff's prior relinquishment of his right to sue. Upon reviewing recent Supreme Court and Second Circuit decisions concerning LHWCA actions and the scope of recovery, as well as the relevant policy concerns, the Court concludes that the insurance company's ratification is an adequate defense to the defendant shipping company's claim that the suit was not instituted by the "real party in interest." Fed. R. Civ. P. 17(a).[1]

Background

On January 12, 1974, the plaintiff Ronald Motta, a longshoreman employed by the Northeast Stevedoring Company ("Northeast"), was injured while working aboard the S/S Ocean Harmonia, a vessel owned and controlled by defendant Resource Shipping & Enterprises Company ("Resource"). Motta filed a claim under LHWCA with the Office of Workmen's Compensation Programs and a formal order was issued on April 16, 1975 granting the plaintiff the sum of $8,199.03. This action was commenced on November 23, 1976, more than six months after acceptance of the compensation award. The defendant thus contended that the suit was barred by section 33(b) of the Act which provides that:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third

> person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b). Relying on *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956) and its progeny, the plaintiff countered that the alleged asignment could be enforced only if the defendant proved that there was "no conflict of interest" between the longshoreman plaintiff and his employer, the stevedore.[2] Before these conflicting claims were resolved, the Court, at counsel's request, decided to delay consideration of the case until after the Second Circuit decided the case of *Rodriguez* v. *Compas Shipping Co.,* 617 F.2d 955 (2d Cir. 1980), *cert. granted,* 49 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 79-1977). *See* Letter to the Court from Joseph T. Stearns, dated, May 16, 1979. *Rodriguez* was decided on March 19, 1980. The court of appeals held that a longshoreman's LHWCA claim was automatically assigned to his employer six months after compensation was awarded even though the award was made in a "settlement agreement" and no formal compensation order was filed. *Id.* at 958-59. In the course of discussing the shipowner's defense that the longshoreman could not institute an action because his claim had been assigned to his employer, the Second Circuit stated:

> The defense raised by the defendants, that plaintiff is not the real party in interest, may always be invoked pursuant to F.R.Civ.P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. . . . A person, such as the employer here, to whom a claim has been assigned under § 33(b), is the real party in interest. . . . Assuming the assignment here to be valid, the right to sue is exclusively that of the employer, which

> has not joined in the action *or ratified its commencement* even though it has had a reasonable time to do so. The defense of assignment therefore is properly asserted as a procedural matter by the defendants.

Id. at 958 (citations omitted) (emphasis added). Seizing on the underscored portion of the Second Circuit's statement, Motta procured a letter from Northeast's insurance company asserting that it ratified the plaintiff's commencement of this suit. This letter read as follows:

> We were the Longshoremen's Act Insurer of Northeast Stevedoring Co., Inc., the employer of plaintiff-claimant on January 12, 1974, the date he was injured while working aboard a Resource Shipping Enterprises Co. vessel.
>
> We have your letter dated March 28, 1980.
>
> We hereby ratify plaintiff-claimant's commencement and continuance of his action against Resource Shipping Enterprises Company to recover damages for the personal injuries he sustained as a consequence of the accident.
>
> If our ratification is sufficient to preserve to plaintiff-claimant ownership of the cause of action, we shall, of course, not institute a separate action against Resource Shipping, and we will be bound by any judgment which may be rendered in said action insofar as it determines liability, or lack thereof, for the accident, and the damages recoverable, if any. We understand also that we would be bound by any release executed by the plaintiff-claimant with our approval. Our lien and credit rights are, however, to attach to the proceeds of any recovery by way of judgment of settlement and are not in any way hereby released or relinquished.

Letter to Irving Kernis, Esq. from Raymond Green, Supervising Attorney, The State Insurance Fund, dated May 6,

1980, annexed to Affidavit of Irving Kernis, Esq., sworn to May 9, 1980 ("Kernis Aff.").

In response to this letter, counsel for Resource submitted a lengthy memorandum arguing that ratification was ineffective in this case for the following reasons: (1) the plaintiff had no cause of action because all his rights were assigned prior to the commencement of the suit and thus the "purported ratification" is a "nullity, since the original action was improperly brought in plaintiff's name in the first instance"; Federal Rule of Civil Procedure ("Rule") 17(a) requires that an action be brought in the "name of the real party in interest" and this requirement can properly be ignored only in extraordinary circumstances not present here; (3) the insurance company's cause of action is materially different than the cause of action that is available to a longshoreman for six months from the time the compensation award is accepted; (4) there is, or may be, a defense available to the defendant in an action brought by the insurance company that would not otherwise be available in a suit instituted in the longshoreman's name. Defendant's Memorandum of Law in Support of a Motion to Dismiss Because the Plaintiff Was Not the Real Party In Interest ("Defendant's Memorandum") at 8-9. The plaintiff, apparently content to rely on the insurance company's ratification letter, never bothered to respond to this memorandum or the arguments made therein.

Discussion

As quoted above, the *Rodriguez* court stated that after assignment, "the right to sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable time to do so." 617 F.2d at 958. While this assertion suggests

that the Second Circuit would approve of ratification in LHWCA cases, the Court cannot rely solely on this statement in resolving this issue. The ratification question was not before the court of appeals and Judge Mansfield's observation was not critical to that decision. *See Kastigar* v. *United States,* 406 U.S. 441, 445-46 (1972) (language unnecessary to Court's decision is not binding authority). The Second Circuit has indicated that "a distinction should be drawn between 'obiter dictum,' which constitutes an aside or an unnecessary extension of comments, and considered or 'judicial dictum' where [a court] ... is providing a construction of a statute to guide the future conduct of inferior courts." *United States* v. *Bell,* 524 F.2d 202, 206 (2d Cir. 1975). Statements falling in the latter category are considered "not binding ... [but] must be given considerable weight and can not be ignored in the resolution of [a] close question." *Id.; see Boyd* v. *Henderson,* 555 F.2d 56, 60 n.5 (2d Cir. 1977). Regardless of whether the *Rodriguez* ratification statement is viewed as "obiter" or "judicial" dictum, this Court adopts the view espoused by Chief Justice Marshall that

> general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.

Cohens v. *Virginia,* 19 U.S. (6 Wheat.) 264, 398 (1821) (referring to dicta appearing in *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803)). Accordingly, giving due respect to the Second Circuit's reference to ratification in *Rodriguez,* this Court now turns to the arguments raised by the defendant in opposition to this procedure.

I. *Real Party in Interest*

Defendant's first contention is that the purported ratification is a "nullity" because Motta had assigned his rights before the suit was instituted and thus the original action was improperly brought by him in the first place. This argument, however, miscomprehends the final provision of Rule 17(a) which states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As explained by Professor Moore:

> The purpose of the provision is to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. Thus its main thrust is to allow a correction in parties after the statute of limitations has run, despite the valid objection that the original action was not brought by the real party in interest.

3A Moore's Federal Practice ¶ 17.15-1, at 182 (2d ed. 1979) (footnotes omitted); *see Wadsworth* v. *United States Postal Service*, 511 F.2d 64 (7th Cir. 1975); *American Jerex Co.* v. *Universal Aluminum Extrusions, Inc.*, 340 F. Supp. 524 (E.D.N.Y. 1972). The very purpose of Rule 17 ratification, therefore, is to respond to claims like that made by the defendant here. Resource's theory that the ratification is a "nullity" because the suit was originally brought by the wrong party cannot be reconciled with the

underlying rationale of Rule 17. In short, the defendant's first argument is soundly countered by the Rule on which it seeks to rely.

Resource's second contention is that the real party in interest requirement "can properly be dispensed with only in most extraordinary circumstances, not present here." Defendant's Memorandum at 8-9. According to Resource,

> The ratification provision, as opposed to substitution provision, can only be applicable when: (1) no difference results in the nature of the cause of action, its impact on the defendant and on the courts and (2) when the original plaintiff is obliged to sue, or is at the same risk regarding the suit as the real party in interest and (3) the real party in interest is at the same risk as would be the titular plaintiff. Identity of claim and remedy, identity of risk and agreement to abide the event are required before ratification may be permitted.

Id. at 11-12.

The source of the limitations posited by the defendant remains a mystery to the Court. Resource cites no authority to support the rather detailed restrictions it seeks to impose on the ratification provision. *Kenrich Corp.* v. *Miller,* 256 F. Supp. 15 (E.D. Pa. 1966), *aff'd,* 377 F.2d 312 (3d Cir. 1967), relied upon by the defendant, is inapposite. The *Kenrich* court invalidated an assignment of the claim to the party bringing suit on the ground that the assignment was "champertous and against public policy." 256 F. Supp. at 18. According to the court, the assignment neither transferred the actual right of action against the defendants nor gave the assignee the ability to compromise or settle the claim. Indeed, the district court found that both the assignor and the assignee retained "alternative rights to prosecute this action at their own expense." *Id.*

And on appeal, the Third Circuit emphasized that under Pennsylvania law, which was applied in this diversity action, the assignment agreement was illegal because it provided for "the institution of litigation by and at the expense of a person who, but for that agreement, has no interest in it, with the understanding that his reward is to be a share of whatever proceeds the litigation may yield." 377 F.2d at 314. In the case before this Court, the insurance company has relinquished its right to bring suit against the shipowner and has agreed to be bound by any judgment or release executed by the plaintiff. Furthermore, in contrast to *Kenrich,* no law prohibits this arrangement. In fact, the LHWCA expressly provides for a longshoreman's suit against the shipowner after the longshoreman has received a compensation award from his employer. The facts and holding of *Kenrich* are thus easily distinguishable from the case at bar.

Resource's reliance on *American Dredging Co.* v. *Federal Ins. Co.,* 309 F. Supp. 425 (S.D.N.Y. 1970), is equally misplaced. In that case, a subcontractor that had been paid by its own insurance company, London Underwriters, for expenses incurred in a building project attempted to sue the insurance companies that had issued a policy to the primary contractor which covered the same loss. The court noted that it was "common in the insurance field" to enter into loan arrangements in which an insurance company advances to the insured the amount of the loss as a loan repayable only out of the proceeds of a suit brought by the insured to recover the loss from the responsible parties. *Id.* at 427. The court continued, however:

> In the case at bar, the loan arrangement between London and plaintiff differs from the usual arrangement of this sort in one important respect. The loan arrangement here does not contemplate suit by

> the assured against the party responsible for the loss in substitution for a suit by the insurer as subrogee. Instead, it was agreed between London and the plaintiff that suit would be brought by the plaintiff assured against the co-insurers for the full amount of the loss paid by London wholly for London's benefit. Yet, London has no right to recover on defendant's policy of insurance as such. The only right which London has against the co-insurers is by way of pro rata contribution. Thus, unlike the subrogation cases, the attempt is made here to confer on London a substantive right to which it is not entitled.
>
> Moreover, if plaintiff were able to recover from the defendant insurers for London's benefit the full amount paid it by London, the defendant insurers in turn would have the right to pro rata contribution from London on the amount paid out to plaintiff by them in satisfaction of the loss. But defendants cannot assert such a claim against London in this suit since London is not a party. Thus giving effect to the device employed here would give rise to multiplicity of litigation.

Id. at 428. The court therefore concluded that the named plaintiff was not the real party in interest and that London would have to pursue its contribution remedy directly against its co-insurers. *Id.* at 429.

Motta's suit, in contrast, represents the "usual arrangement" in which a party reimbursed for its loss by the insurer is "deemed not to have received payment and retains the right to sue in its own named and recover the loss from the party who has caused it." *Id.* at 427. This is precisely the arrangement contemplated by section 33(b) of the Act which provides that the longshoreman can institute suit within six months of accepting a compensation award. The longshoreman is thus the real party in

interest even though proceeds from his suit must be used to reimburse his employer, or its insurance company, for compensation payments. *See Bloomer* v. *Liberty Mut. Ins. Co.*, 48 U.S.L.W. 4211 (U.S. Mar. 3, 1980). Unlike the arrangement invalidated in *American Dredging*, permitting the longshoreman to sue in his own name neither "confer[s] on [The State Insurance Fund] a substantive right to which it is not entitled" nor "give[s] rise to multiplicity of litigation" 309 F. Supp. at 428. The concerns expressed in that decision, and the result reached, are inapplicable to the case at hand.

The gist of defendant's third and fourth objections to allowing ratification in this case is that the insurance company's LHWCA cause of action is "materially different" from the longshoreman's suit and may be subject to a defense that would be unavailable against the longshoreman. These objections are reflected in Resource's assertion that ratification, as opposed to substitution, is appropriate only when "no difference results in the nature of the cause of action" and the original plaintiff and the real party in interest bear equal risks with respect to the suit. While these proposed restrictions are not groundless, they are not compelled by the language or underlying purpose of Rule 17(a) and the ratification provision. Furthermore, Resource has exaggerated the difference between an insurer's suit and a longshoreman's LHWCA suit. Each of these issues will be discussed in turn.

The purpose of the real party in interest rule is to "protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Notes of Advisory Committee, Fed. R. Civ. P. 17 (a), 1966 Amendment. A letter or document that ratifies the commencement and continuation of an action may be

sufficient to cure any real party in interest defects in the suit. *deVries* v. *Weinstein Int'l Corp.*, 80 F.R.D. 452, 459 (D. Minn. 1978); *Clarkson Co.* v. *Rockwell Int'l Corp.*, 441 F. Supp. 792, 797-98 (N.D. Cal. 1977); Wright & Miller, Federal Practice and Procedure: Civil § 1555, at 709. The district court has discretionary authority to determine whether ratification is appropriate in a given case. *James* v. *Nachville Bridge Co.*, 74 F.R.D. 595, 597 (N.D. Miss. 1977); *Southern Nat'l Bank of Houston* v. *Tri Financial Corp.*, 317 F. Supp. 1173, 1188 (S.D. Tex. 1970). This discretion must be exercised in a manner consistent with the Rule's purpose to protect the defendant from subsequent litigation and to finally resolve the dispute at hand. *See James* v. *Nashville Bridge Co., supra,* 74 F.R.D. at 597; *Prudential Lines, Inc.* v. *General Tire Int'l Co.*, 74 F.R.D. 474, 476 (S.D.N.Y. 1977).

The letter of ratification submitted in this case states that The State Insurance Fund, Northeast's insurance company and the real party in interest, ratifies Motta's commencement and continuance of this suit. The insurance company agrees to be bound by any judgment rendered in this action that determines liability and damages. Furthermore, it recognizes that it would be bound by any release Motta executed with the insurance company's approval. It also asserts that it will not institute a separate action against Resource. The State Insurance Fund expressly reserves its lien and credit rights and states that they will "attach to the proceeds" resulting from any judgment or settlement.

The defendant contends that having "nothing at stake in the way of potentially unrecoverable counsel fees and litigation expenses, the insurance company has nothing to lose, yet can control the outcome of the case by withholding any concession of its 'lien.'" Defendant's Memoran-

dum at 3. In Resource's view, ratification would "insulat[e] the insurance company from the need to make any ethical or business judgment on any aspect of this case although it may prove to be, at no risk, the sole beneficiary." *Id.* at 3-4. Resource also asserts that the longshoreman's and the insurance company's LHWCA suits differ "with respect to the burden of counsel fees and the cost of litigation, as well as in regard to distribution of any proceeds." *Id.* at 14.[3] For example, the defendant points out that under the Supreme Court's recent decision in *Bloomer* v. *Liberty Mut. Ins. Co., supra,* a longshoreman bears the expense of his own suit while the stevedore, which can recover its lien without cost, gets a free ride. If the stevedore, or its insurance company, sues on an assigned cause of action pursuant to section 33(b), it takes the chance of incurring its own litigation costs if the suit fails, and of recouping less than the full amount of its litigation expenses even if the suit succeeds. According to the defendant, "the stevedore could never obtain a fee arrangement with its own attorney on anything approaching the favorable terms accorded to it by the Supreme Court in *Bloomer.*" *Id.* at 17. Resource also contends that when the stevedore holds a lien on the recovery procured by the longshoreman, it can frustrate disposition of the case by refusing to waive or compromise its claims. When the stevedore, or its insurance company, brings an action under the Act, section 33(e) establishes the required distribution of proceeds. When the longshoreman himself sues, part of his recovery goes to reimbursing his employer and he retains the rest, minus counsel fees and litigation costs. In the defendant's view, "[p]ermitting ratification encourages the real party in interest [the insurance company] to gamble where, if it were potentially liable for fees and litigation costs it would, perhaps, not." *Id.* at 17. Resource thus contends

that ratification in LHWCA cases contravenes the "ethical considerations" underlying Rule 17(a) and is inconsistent with the Act's policy of discouraging needless litigation because it promotes actions that might not be "sufficiently savory for the insurance company or the employer to sponsor directly." *Id.* at 18.

Even assuming that some of defendant's allegations accurately describe the ratification arrangement, the Court rejects the bald assertion that this description demonstrates why ratification is inappropriate here. The ratification letter submitted by The State Insurance Fund ensures that any judgment or settlement resulting from Motta's suit will safeguard Resource against further litigation. The twin purposes of Rule 17(a) described above—protection of the defendant and effectuation of res judicata—would therefore be achieved by ratification. While this arrangement may be particularly advantageous to the insurance company, that is an issue to be resolved between Motta and The State Insurance Fund. Insofar as time, money, and resources are concerned, the cost of the company's alleged "no risk stake" is born [sic] by Motta, not the defendant. Resource, therefore, should not be able to invalidate an arrangement that is agreeable to these parties on the ground that undue benefits may inure to the insurance company. The benefits that the company may enjoy by virtue of this arrangement do not result in a corresponding loss to the defendant.

As stated in the Advisory Committee on the 1966 Amendment to Rule 17(a), "[i]n its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." This purpose would be well served by allowing The State Insurance Fund to ratify Motta's suit. Under the 1959 amendment to the LHWCA, Pub. L. 86-171, 73 Stat. 391 (1959),

the longshoreman could have instituted his own action against the defendant within six months of accepting a compensation award. This amendment was enacted to resolve the preexisting dilemma of a longshoreman forced to choose between taking immediate compensation from his employer, the stevedore, or risking a third-party action against the shipowner. Congress recognized that:

> In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage.
>
> * * *
>
> The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The committee believe that in theory and practice this is sound approach to what has been a difficult problem.

S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959), reprinted in 1959 U.S. Code Cong. & Ad. News 2134, 2135. While Congress provided that the cause of action would accrue to the insurance company within six months of the acceptance of a compensation award, there is no evidence that the legislature would prohibit the insurance company from relinquishing its right to sue. The automatic assignment mechanism insured that the stevedore, or its insurance company, would have a remedy against the shipowner in

the event that the longshoreman chose not to sue. This assignment may be nullified in certain limited situations where a conflict of interest is established between the stevedore and the shipowner, *see, e.g. Czaplicki* v. *The Hoegh Silvercloud, supra; McClendon* v. *Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965), or the insurance company's subrogation rights may be waived, *see Allen* v. *Texaco, Inc.,* 510 F.2d 977 (5th Cir. 1975).

In short, this assignment is not absolute. The Supreme Court has recognized that both the stevedore and the longshoreman have a common interest in the longshoreman's recovery against the shipowner. *Bloomer* v. *Liberty Mut. Ins. Co., supra,* 48 U.S.L.W. at 4212. The stevedore's interest, however, does not detract from the salutory result produced by ratification, the enhancement and increased availability of a longshoreman's right to sue under the Act notwithstanding the acceptance of a compensation award. Indeed, the advancement of both parties' interests in [sic] consistent with two primary purposes underlying LHWCA's more recent 1972 amendments: "to benefit longshoremen" and "to conserve stevedore expenses." *Bloomer* v. *Liberty Mut. Ins. Co., supra,* 48 U.S.L.W. at 4214 n.11. Rule 17(a) ratification allows the parties freedom to determine who shall prosecute a suit in which they both rightfully claim an interest. In the absence of any prejudice to the defendant, this result is consistent with the underlying rationale of the Rule and the policy concerns embodied in the Act.

A similar conclusion was reached by the court in *The Owen,* 43 F. Supp. 897 (E.D. Pa. 1942), a case arising long before the enactment of the LHWCA's 1959 or 1972 amendments. The longshoreman in that case sued the shipowner for injuries sustained while aboard the ship. The shipowner's principal defense was that the longshoreman could

not maintain the action "because he accepted three payments under the [LHWCA], Act of March 4, 1927 c. 509, 44 Stat. 1424, 33 U.S.C.A. § 901 et seq., and that under that Act such acceptance effects an assignment of the libellant's claim against a third party to his employer." *Id.* at 898. The court agreed with this statement of the facts. It noted, however, that the longshoreman had introduced into evidence an agreement executed by his employer, the stevedore, "reassigning to him the claim against any third party responsible for his injury, in consideration of his returning to it the compensation payments which it had made to him." *Id.* at 899. This agreement, the court held, was sufficient to allow the longshoreman to proceed directly against the shipowner notwithstanding the acceptance of compensation benefits. The court's reasoning, which is equally applicable here, was as follows:

> It therefore definitely appears that the employer in the case at bar has assented to the libellant's maintaining this action against a third party. In this respect this case differs from the cases relied upon by claimant, in all of which the employer either definitely opposed the claim of the employee against the third party, or there was no showing on the record of its position. This provision of the Longshoremen's and Harbor Workers' Compensation Act which transfers to the employer the rights of its employee against a third party upon the employee's acceptance of compensation is designed for the protection and benefit of the employer, not the third party wrongdoer. It entitles the employer who must pay compensation to the injured employee irrespective of fault, to enforce the employee's tort claim against any third party by whose fault the injury occurred. The third party tortfeasor was not the party sought to be protected by this provision of the Act and is

> given no ground thereunder to say which of two persons who may be entitled under the law to maintain an action against him may do so, except to the extent that he is entitled to protection against being exposed to action by both. Accordingly, where the employer objects to the action by the employee against the third party, or does not affirmatively assent thereto on the record, the third party may assert as a complete defense to an action by the employee the transfer of the employee's claim to the employer by operation of the Act, since otherwise he would still be subject to a like claim by the employer. Where, however, as in the case at bar, the employer, for whose protection Section 33 of the Act was adopted, has, by executing an assignment of the claim to the injured employee, disclaimed the right thus given to it by that section, the third party tortfeasor cannot rely upon the Act as a defense to a libel by the employee.

Id. at 899. *See also Magee* v. *McNany,* 10 F.R.D. 5 (W.D. Pa. 1950) (relying on *The Owen* in holding that an employer, to whom an employee's New York Workmen's Compensation Act rights have been assigned, can "authorize in writing counsel for the plaintiff to institute and prosecute the right to recover damages against the [third-party tortfeasor]").

II. *Defenses*

The final prong to defendant's attack against ratification of the longshoreman's suit is that it would eliminate a defense to the LHWCA action that would be available to company, the alleged "real and only party in interest." Dethe shipowner if the suit were brought by the insurance fendant's Memorandum at 21. In Resource's view, substitution, as opposed to ratification, would not produce such

an unfair result. The Court agrees that prejudice to the defendant is a factor to be considered in determining whether ratification should be permitted in a given case. And, as noted by some courts, an important function of the real party in interest rule is to enable the defendant to present all the defenses he has against the party entitled to pursue the claim. *See, e.g., Virginia Elec. & Power Corp.* v. *Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974); *Celanese Corp.* v. *John Clark Indus., Inc.*, 214 F.2d 551, 556 (5th Cir. 1954); *Pace* v. *General Elec. Co.*, 55 F.R.D. 215, 218 (W.D. Pa. 1972). Therefore, careful consideration must be given to defendant's claim that ratification "may well confer a substantive right on the insurance company that it would not have if it proceeded in its own name." Defendant's Memorandum at 12.

According to the defendant, the critical substantive difference between a longshoreman's suit and an insurance company's LHWCA suit is that the insurance company, but not the longshoreman, is subject to the shipowner's defense that the injuries were caused in part by the negligence of the employer, the stevedore. The defendant correctly cites *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), for the proposition that in an action brought by the longshoreman, a shipowner will be held liable for the total amount of the longshoreman's damages even though the stevedore's negligence contributed to his injuries. The defendant errs, however, in asserting that when an insurance company sues pursuant to section 33(b), it is subject to the defense, to the extent of its compensation expenses, that the stevedore's negligence contributed to the longshoreman's injuries. Resource's view of the law is apparently based on a misinterpretation of *Federal Marine Ter-*

minals, Inc. v. *Burnside Shipping Co.*, 394 U.S. 404 (1968), in which the Supreme Court held that the Act did not preclude a stevedore from pursuing an independent action against the shipowner based solely on the shipowner's breach of duty to the stevedore. The Court noted that its holding did not signal a departure from the *Halcyon* "no contribution" rule because the stevedore was not trying to impose responsibility on the shipowner for their joint negligence toward the longshoreman; the suit was not founded on the shipowner's "wrong" to the longshoreman "but on its independent wrong" to the stevedore. *Id.* at 418. In the defendant's view, since the stevedore's *"Burnside* cause of action" is subject to the *Halcyon* "no contribution" rule, a similar restriction must be imposed on an action brought under section 33(b). The defendant thus concludes that the stevedore's negligence must be a defense when it, or its insurance company, sues the shipowner because it would be inconsistent with the "no contribution" rule to allow the negligent stevedore to recover its compensation expenses from the shipowner. Defendant's Memorandum at 19-21.

Notwithstanding the policy concerns raised by the defendant, this Court disagrees with its reading of the law. *Burnside* should not be read so broadly as to govern this statutorily defined cause of action, based on the shipowner's negligence toward the *longshoreman,* which would normally be subject to the same rules as the longshoreman's own suit. In *Landon* v. *Lief Hoegh and Co.*, 521 F.2d 756, 760-61 (2d Cir. 1975), the Second Circuit observed that *Burnside* involved an atypical situation and it was questionable whether a *"Burnside* type of action" continues to exist in light of the 1972 amendment to the Act which provided that it was "exclusive of all other remedies against the vessel." 33 U.S.C. § 905. More importantly, in discussing the inter-

play between *Burnside, Halcyon* and *Pope & Talbot,* the court of appeals stated:

> It is true, of course, that section 33(b) does not speak in the language of "lien" but of "an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person" . . . , but under the law, the compensation payment recoupment may not be defeated on the theory of concurrent negligence, in any event.

Id. at 760 n. 3.

Finally, defendant's view that the insurance company's suit is subject to a defense based on the stevedore's contributory negligence is contrary to the Supreme Court's recent decision in *Edmonds* v. *Compagnie Gen. Transatlantique,* 443 U.S. 256 (1979). The *Edmonds* Court held that the 1972 LHWCA amendments were not intended to establish a proportionate-fault standard to replace the judicially created admiralty rule that the shipowner can be liable for all the longshoreman's damages that are not attributable to his own negligence. The Court thus rejected the conclusion reached by an en banc panel of the Fourth Circuit that the traditional admiralty rule had been changed to make the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. *Id.* at 258-59. The *Edmonds* Court described how such a rule could create "many circumstances" in which the longshoreman could not recover in any way the full amount of damages determined in his suit against the vessel. *Id.* at 269. For example, if his damages are at least twice the benefits paid under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced proportionate-fault recovery from the ship would not amount to his total damages. Furthermore, the Court continued,

the impact of the proportionate-fault rule on the longshoreman does not stop there. Under § 933(b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's favor operates where the longshoreman himself sues. In the past, this lien has been for the benefits paid up to the amount of the recovery. And under § 933(c), which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. Under the Court of Appeals' proportionate-fault system, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect. Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages *directly or indirectly*," 33 U.S.C. § 905(b) (emphasis supplied), and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter should no longer have to appear routinely in suits between longshoreman and shipowner.

Id. at 269-71 (footnotes omitted).

This passage demonstrates that the Supreme Court has rejected the view that an insurance company's section 33(b) suit is subject to the defense that the shipowner's liability should be less than the total amount of damages because the stevedore's negligence contributed to the longshoreman's injuries. In neither an insurance company's nor a longshoreman's LHWCA action can the shipowner reduce its liability by virtue of the concurrent negligence of the stevedore. The defendant's purported distinction between these two suits appears, therefore, to be nonexistent. Accordingly, the Court rejects Resource's argument that ratification is inappropriate here because it would eliminate a defense that would otherwise have been available to it.

Conclusion

Defendant Resource's motion to dismiss the complaint on the ground that Motta is not the real party in interest is denied. The Court concludes that ratification of a longshoreman's LHWCA action by the insurance company to which the claim has been assigned is consistent with the policies underlying Rule 17(a) and the Act. The State Insurance Fund's ratification letter, therefore, has "the same effect as if the action has been commenced in the name of the real party in interest." Fed. R. Civ. P. 17(a).

So ordered.

Dated: New York, New York
October 22, 1980

CHARLES H. TENNEY
U.S.D.J.

76 Civ. 5217 (CHT)

RONALD MOTTA,

Plaintiff,

—against—

RESOURCE SHIPPING & ENTERPRISES CO.,

Defendant.

FOOTNOTES

1. Federal Rule of Civil Procedure ("Rule") 17(a) provides:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

2. In *Czaplicki* v. *The Hoegh Silvercloud, supra,* the Supreme Court held that a statutory assignment effected by section 33(b) can be invalidated if a conflict of interest exists between the longshoreman and his employer. When "the inaction of the assignee operates to defeat the employee's interest in any possible recovery," the Court stated that "the statute should be construed to allow [the longshoreman] to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531. Since *Czaplicki* was decided, some courts have relied on the conflict-of-interest doctrine to invalidate assignments and allow longshoremen to institute their own suits against shipowners after the six-month period has expired. *See, e.g., Potomac Elec. Power Co.* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965); *Johnson* v. *Sword Line, Inc.,* 257 F.2d 541 (3d Cir. 1958).

Plaintiff's first response to defendant's motion to dismiss was that "[t]he motion must be denied as defendant did not sustain its burden of proof to show that there is no conflict of interest between the

plaintiff and the stevedore." Affidavit of Morris Cizner, sworn to August 17, 1979, ("Cizner Aff.") at 1. The Court rejects this argument. The weight of authority in this Circuit places the burden of proof on the *plaintiff* to submit evidence demonstrating a conflict of interest sufficient to nullify this statutory assignment. The court of appeals recently reaffirmed this view in *Rodriguez* v. *Compass Shipping Co.*, 617 F.2d 955 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 79-1977). Viewing *Czaplicki* "as limited to its unique facts," *id.* at 961, the Second Circuit disagreed with the contention that the employer's mere failure to sue the shipowner demonstrated that the assignment should be invalidated on public policy grounds.

Motta has presented no evidence of a conflict of interest in the case at bar. Instead, he rests solely on his assertion that the stevedore's failure to bring an action against the shipowner is "ipso facto" sufficient "to take the case out of the statute." Cizner Aff. at 2. This statement of the law is clearly erroneous and Motta's conflict-of-interest defense is without merit.

3. Pursuant to section 33(e):

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to—
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commission or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the reprerepresentative; and
>
> (2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.